STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Village of Monee, Petitioner	)	
	)	
vs.	)	
	)	Docket No. 06-0669
Aqua Illinois, Inc., Respondent	)	
	)	
Complaint as to refusal to provide sewage service as to several parcels of property within Monee, Illinois.	)	
	)	Consolidated Docket No. 06-0685
Aqua Illinois, Inc., Petitioner	)	
	)	
Petition for Emergency Relief	)	

LEGAL AUTHORITY IN SUPPORT OF VILLAGE OF MONEE'S
RESPONSE TO AQUA'S MOTION TO DISMISS

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CASE LAW **TAB**

STATUTES / REGULATIONS / RULES

TAB 1

C Amalgamated Trust and Sav. Bank v. Village of Glenview
Ill.App., 1981.

Appellate Court of Illinois, First District, Fifth Division.
AMALGAMATED TRUST AND SAVINGS BANK as Trustee Under Trust Agreement No. 2563, and Terrecom Development Group, Inc., Plaintiffs-Appellants,
v.
VILLAGE OF GLENVIEW, a Municipal corporation, Illinois Department of Transportation and John D. Kramer, Secretary of the Illinois Department of Transportation, Defendants-Appellees.
No. 79-1755.

June 26, 1981.

Nonresidents of village who brought action to compel village to supply water service to them through water company which village purchased appealed from judgment of the Circuit Court, Cook County, Richard L. Curry, J., dismissing complaint for failure to state cause of action. The Appellate Court, Lorenz, J., held that: (1) absent allegation upon which nonresidents could have been reasonably entitled to water service from predecessor water company, there was no basis for concluding that village assumed such duties; (2) representations made by village at Department of Transportation hearings were insufficient as a matter of law to establish cause of action for relief under theory of equitable estoppel; (3) village, by ordinance requiring annexation and conformance to its land use plans as prerequisite to providing water, did not violate state antitrust laws; and (4) injunctive relief was properly refused by trial court.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 277

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k277 k. Improvements and Works Beyond Boundaries of Municipality. Most Cited Cases
Municipality is under no obligation to supply nonresidents with water in absence of contractual undertaking. S.H.A. ch. 24, § 11-149-1.

[2] Municipal Corporations 268 277

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k277 k. Improvements and Works Beyond Boundaries of Municipality. Most Cited Cases
Invocation of rule that municipality purchasing water company outside its city limits becomes bound to supply persons outside city limits where private company was burdened with such duty depends upon relationship between such nonresidents and original facility. S.H.A. ch. 24, § 11-149-1.

[3] Municipal Corporations 268 271

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k271 k. Water Supply. Most Cited Cases
If functioning water company acquired by municipality had no obligation to supply water to particular customer, municipality in purchasing such company assumes no greater duty. S.H.A. ch. 24, § 11-149-1.

[4] Public Utilities 317A 113

317A Public Utilities
317AII Regulation
317Ak113 k. Certificates, Permits, and Franchises. Most Cited Cases
(Formerly 317Ak6.6)
Certificate of convenience and necessity is issued to

public utility to prevent unnecessary duplication of facilities and to protect public from inadequate service and higher rates resulting from such duplication while simultaneously protecting utility against indiscriminate or ruinous competition. S.H.A. ch. 111 2/3 , § 56.

[5] Public Utilities 317A 114

317A Public Utilities
317AII Regulation
317Ak114 k. Service and Facilities. Most Cited Cases
(Formerly 317Ak6.7)
Public utility has duty to serve customers in its area if, upon application, they are deemed to be reasonably entitled to such service. S.H.A. ch. 111 2/3 , § 38.

[6] Municipal Corporations 268 619

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k610 Regulation of Occupations and Employments
268k619 k. Charges and Prices. Most Cited Cases
Although municipalities which own utilities are exempt from regulation as "public utility," they are required by common-law duty to serve all of their customers without unreasonable discrimination in rates or manner of service. S.H.A. ch. 111 2/3 , § 10.3, subd. 1.

[7] Municipal Corporations 268 277

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k277 k. Improvements and Works Beyond Boundaries of Municipality. Most Cited Cases
In absence of allegation upon which nonresidents of village would have been reasonably entitled to water service from investor owned public utility, there was no basis for concluding that its village, upon purchase of utility, assumed such duties.

[8] Estoppel 156 62.4

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.4 k. Municipal Corporations in General. Most Cited Cases
Doctrine of equitable estoppel against municipality requires affirmative act on part of municipality and inducement of substantial reliance on such affirmative act.

[9] Estoppel 156 62.4

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.4 k. Municipal Corporations in General. Most Cited Cases
Nonresidents could not compel village to supply them with water under equitable estoppel theory where village, at Department of Transportation hearing, represented only that it was in process of acquiring utility, that it would be responsible for providing water to all portions of utility's certificated area and that it contemplated need of water only for development already approved and under construction and there were, therefore, no affirmative acts by village sufficient to induce nonresidents' reliance in expending money to develop their property.

[10] Antitrust and Trade Regulation 29T 903

29T Antitrust and Trade Regulation
29TXI Antitrust Exemptions and Defenses
29Tk901 State Action
29Tk903 k. Municipalities. Most Cited Cases
(Formerly 265k12(15.6), 265k12(15.5), 265k12(1))
Village, by ordinance requiring annexation and conformance to its land use plans as prerequisite to nonresidents' receiving water service, did not establish a monopoly in violation of the Antitrust

Act. S.H.A. ch. 38, § 60-3.

[11] Antitrust and Trade Regulation 29T 569

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk568 Tying Agreements
29Tk569 k. In General. Most Cited Cases
(Formerly 265k17.5(2), 265k17(2.5))
"Tying arrangement" is defined as agreement by party to sell one product, but only on condition that buyer also purchase a different product. S.H.A. ch. 38, § 60-3.

[12] Antitrust and Trade Regulation 29T 569

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk568 Tying Agreements
29Tk569 k. In General. Most Cited Cases
(Formerly 265k17.5(7), 265k17(2.5))

Antitrust and Trade Regulation 29T 571

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk568 Tying Agreements
29Tk571 k. Economic Power. Most Cited Cases
(Formerly 265k17.5(7), 265k17(2.5))
Tying arrangements are per se illegal when party has sufficient economic power with respect to tying product to appreciably restrain free competition in market for tied product and a "not insubstantial" amount of interstate commerce is affected. S.H.A. ch. 38, § 60-3.

[13] Antitrust and Trade Regulation 29T 569

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk568 Tying Agreements
29Tk569 k. In General. Most Cited Cases
(Formerly 265k17.5(5), 265k17(2.5))
Tying arrangements are embraced under the Antitrust Act if, tested by the "rule of reason," they are found to be injurious to competition. S.H.A. ch. 38, § 60-3.

[14] Antitrust and Trade Regulation 29T 535

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(A) In General
29Tk532 Judicially Created Tests of Legality
29Tk535 k. Rule of Reason. Most Cited Cases
(Formerly 265k12(1.10))
Under rule of reason, courts must consider actor's purpose in entering into arrangement, nature of conduct, effect on industry and competitive climate in the industry.

[15] Antitrust and Trade Regulation 29T 600

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(E) Particular Industries or Businesses
29Tk598 Regulated Industries
29Tk600 k. Utilities. Most Cited Cases
(Formerly 265k17.5(9.1), 265k17.5(9), 265k17(2.5))
Position of village, expressed in ordinance whereby it would provide water to nonresidents if, by annexation, it could compel nonresidents to develop their land in conformance with comprehensive land plan of village, did not constitute tying arrangement in violation of state antitrust laws. S.H.A. ch. 38, § 60-3.

[16] Injunction 212 22

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k20 Defenses or Objections to Relief
212k22 k. Injunction Ineffectual or Not Beneficial; Mootness. Most Cited Cases
Injunctive relief is properly refused where it is

unnecessary and of no benefit to plaintiff.

[17] Injunction 212 22

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k20 Defenses or Objections to Relief
212k22 k. Injunction Ineffectual or Not Beneficial; Mootness. Most Cited Cases
Where injunction against allocation of additional water to village would not benefit nonresidents who brought suit against village or bring water to their development, dismissal of count of nonresidents' complaint requesting such injunction was proper.

****1231 *256 ***427** William J. Harte, Ltd., Chicago, for plaintiffs-appellants.
Christine Hehmeyer Rosso, Chapman & Cutler, Chicago, Zachary D. Ford, Glenview, for defendants-appellees.

****1232 ***428** LORENZ, Justice:
Plaintiffs, Amalgamated Trust and Savings Bank (Amalgamated Trust) and Terrecom Development Group, Inc. (Terrecom), who are nonresidents of defendant, Village of Glenview (Glenview), brought an action against Glenview to compel it to supply water service to them through a water company which the Village purchased. Injunctive relief was also sought against defendants, Illinois Department of Transportation (IDOT) and John D. Kramer, Secretary of the Illinois Department of ***257** Transportation to prevent them from allocating water to Glenview until water was made available to plaintiffs on the same terms and conditions as required of Glenview residents. The trial court dismissed plaintiffs' complaint for its failure to state a cause of action.

Plaintiffs appeal, and raise the following issues: (1) Glenview assumed the obligation to supply water to plaintiffs when it purchased a water company then serving customers located within the company's certificated area of convenience and necessity, a portion of which included plaintiffs' property; (2) Glenview is estopped from denying its obligation to provide plaintiffs with water by virtue of misrepresentation made to IDOT at a public hearing to receive an allocation of water; (3) Glenview's conduct in requiring plaintiffs to annex to the municipality as a condition to receiving water service violates state antitrust law (Ill.Rev.Stat.1977, ch. 38, par. 60-3); and (4) the trial court erred in finding that plaintiffs' action against IDOT was an improper attempt to collaterally attack its allocation order.

Plaintiffs' five-count complaint reveals the following. Amalgamated Trust, as trustee, is the owner of about 36 acres of property in unincorporated Northfield Township, Cook County, Illinois. Terrecom is both a contract purchaser and contract lessee of the property. On July 26, 1960, the Illinois Commerce Commission granted to Northfield Woods Water and Utility Company, Inc. (Northfield), a Certificate of Convenience and Necessity authorizing it to operate a public water supply system in an area which included plaintiffs' property. Subsequently, Glenview petitioned IDOT, the agency responsible for apportioning Lake Michigan water, for a supply of water. On August 6, 1975, Glenview represented to IDOT at a public hearing that it was in the process of acquiring Northfield, and that it would be responsible for providing water to the certificated area.

On April 15, 1977, IDOT issued an opinion and order allocating water to Glenview, but the order did not include a quantity for the Northfield system. Glenview then petitioned IDOT for a rehearing, stating that the allocation given it was insufficient to meet the projected needs of its expanded system as a result of the anticipated acquisition of Northfield and another private company. The petition was denied, but Glenview was permitted to file a petition for modification of the order.

On April 4, 1978, IDOT held hearings for emergency allocations and granted Glenview the requested water supply.

Glenview adopted an ordinance on July 17, 1978 which provided that water service would not be provided to property beyond its corporate limits unless those desirous of the service petitioned to annex to Glenview and conformed to its land use plans. Plaintiffs wished to utilize Glenview's water system without annexing, and sought to develop their ***258** property in a manner inconsistent with Glenview's ordinance. In reliance upon water supply from Northfield, however, Terrecom entered into substantial contractual relations with Amalgamated Trust, and expended large amounts of money for the

development of the subject property. Glenview refused to furnish water to plaintiffs' property in the absence of compliance with its ordinance and comprehensive land use requirements. Persistence in this refusal would require installation of a separate and independent water supply system by plaintiffs at a cost of over $900,000.

Count I of the complaint sought a declaratory judgment that plaintiffs are entitled to water service from Glenview and that the latter's ordinance restricting this supply is invalid. Count II requested a mandatory ****1233 ***429** injunction restraining Glenview from enforcing the ordinance and directing it to supply water to plaintiffs. Count III asked for IDOT to be enjoined from allocating additional water to Glenview and the area previously certificated to Northfield unless water was made available to them without the stated condition. Count IV prayed for money damages against Glenview in the amount of $900,000. Count V requested damages in the amount of $2,700,000 for Glenview's violations of Illinois antitrust law (Ill.Rev.Stat.1977, ch. 38, par. 60-3) in limiting the supply of water to nonresidents and thereby establishing a monopoly in the water supply business.

OPINION

Plaintiffs first contend that Glenview, a municipality, had a duty to provide them with water. This obligation allegedly arose upon Glenview's purchase of Northfield, the private water company previously serving customers under a Certificate of Convenience and Necessity (Ill.Rev.Stat.1977, ch. 1112/3, par. 56) in the area which included plaintiffs' property. It is argued that Northfield had an absolute duty to serve all the property in the area designated under the Certificate of Convenience and Necessity, and that this obligation was necessarily assumed by Glenview.

[1] It is undisputed that plaintiffs' property is located beyond the corporate limits of Glenview. Generally, in Illinois, a municipality has no duty to provide water service beyond its boundaries. (Ill.Rev.Stat.1977, ch. 24, par. 11-149-1.)The Illinois Municipal Code provides in section 11-149-1 that such service is discretionary and that, "the corporate authorities may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas outside the corporate limits."Ill.Rev.Stat.1977, ch. 24, par. 11-149-1, emphasis supplied.

In Exchange National Bank of Chicago v. Behrel (1972), 9 Ill.App.3d 338, 292 N.E.2d 164, the First District of the Illinois Appellate Court interpreted the word "may" in section 11-149-1 of the Municipal Code to mean that ***259** a municipality's grant of authority to supply water to nonresidents is discretionary. The Court further found that nonresidents can only compel service if they are able to plead a legal right to it. In Exchange, the City of Des Plaines contracted with Rand, a nonresident, to supply water to homes located within Rand's subdivision. Subsequently, Kiwanis, which was located outside the subdivision, paid Rand for the right to tap into the water main. Permission was granted by the City of Des Plaines and the connection was made. Plaintiff purchased Kiwanis' property a few years later, and paid Rand $1,800 to use the water. Then, the City of Des Plaines annexed the Rand subdivision and attempted to include plaintiff's property. Plaintiff resisted the City's attempt to annex its property, since plaintiff planned to erect multiple dwelling units which conformed with the county ordinances, but would have been in violation of the applicable Des Plaines Zoning Ordinance. Des Plaines refused plaintiff's request for water service, causing the latter to bring suit. The Appellate Court, citing Rehm v. City of Batavia (1955), 5 Ill.App.2d 442, 125 N.E.2d 831, found that Des Plaines had no duty to supply water to plaintiff, and stated:

"It is well established that a municipality is under no duty to furnish a water supply to nonresidents in the absence of contractual relationship obligating it so to do (citation omitted)." (Exchange, 9 Ill.App.3d at 341, 292 N.E.2d at 167.)

The court reasoned that Kiwanis was supplied with water gratuitously by Des Plaines rather than by contractual duty and that the City's annexation attempt did not abrogate a duty to plaintiff, since such a duty never existed. Despite acquiescing in Kiwanis' use of its water supply, Des Plaines was not required to provide service to plaintiff's land, "especially in view of the fact that plaintiff's contemplated development of its property would envision a substantial increase in the use of water over that required by the modest facilities of the Kiwanis Club's camp."9 Ill.App.3d 338, 342, 292

N.E.2d 164, 167.

****1234 ***430** Although the law is well settled that a municipality is under no obligation to supply nonresidents with water in the absence of contractual undertakings, our research reveals no case in this jurisdiction that deals precisely with the problem here: whether a municipality which acquires a functioning water company outside its corporate limits assumes the absolute duty to supply all potential customers within the previously served area. We, therefore, are compelled to examine other authority.

[2][3] McQuillan, in his treatise on Municipal Corporations, has recognized that a cause of action by nonresidents may exist against a municipality if it acquires a company which was bound to serve customers prior to the sale. The rule is stated as follows:

"Where the municipality purchases the plant of a private company, it acts thereafter in a proprietary capacity in carrying on the ***260** obligations of the quasi-public company, and is under the obligation and possesses the rights of such company * * *. A municipality purchasing a private plant becomes bound to supply persons outside the city limits where the private company was burdened with such duty."(12 McQuillan on Municipal Corporations, s 35.35c (revised 1970).)

Likewise, this rule is recognized in 38 Am.Jur. 259-260, "Municipal Corporations," in similar fashion:
"A municipal corporation empowered to purchase an existing public utility plant serving territory with and without the corporate limits should, it has been held, step into the shoes of the public utility and continue to furnish service not merely to inhabitants within the corporate limits, but to people outside the corporation formerly served by the utility. In the absence of express constitutional or legislative regulations, it is generally held that a municipal corporation in conducting extraterritorial activities such as public utilities is subject to the condition in force within the outside territory in which it acts."

This rule was obviously designed to protect people being served by a public utility from being arbitrarily denied such service by a municipality that is only interested in the value of the acquired company. Invocation of this rule, however, depends upon the relationship between the nonresidents and the original facility. Obviously, if no obligation to supply water exists in the first instance, a municipality that purchases its extraterritorial predecessor assumes no greater duties. Thus, the resolution of this case turns upon the duties Northfield owed to the property owners in the area it served.

[4][5][6] Prior to its purchase by Glenview, Northfield, an investor-owned public utility, had been issued a Certificate of Convenience and Necessity (CCN) by the Illinois Commerce Commission (Ill.Rev.Stat.1977, ch. 1112/3, par. 56), and was furnishing water to consumers in an area upon which plaintiffs' undeveloped property was located. A public utility may not operate in an area unless it obtains a CCN, which certifies that public convenience and necessity require the transaction of such business. (Ill.Rev.Stat.1977, ch. 1112/3, par. 56.)One of the chief purposes of requiring a CCN is to prevent the unnecessary duplication of facilities and to protect the public from inadequate service and higher rates resulting from such duplication, while simultaneously protecting a utility against indiscriminate or ruinous competition. (Chicago & West Town Rys. v. Illinois Commerce Commission (1943), 383 Ill. 20, 48 N.E.2d 320.) A CCN has been deemed a license, or mere permission to do certain acts within a specified period. (Chicago Rys. Co. v. Commerce Commission (1929), 336 Ill. 51, 167 N.E. 840.) Yet, every ***261** public utility is required, upon reasonable notice, to furnish to all persons, "who may apply therefor and be reasonably entitled thereto," suitable facilities and service, without discrimination and delay. (Ill.Rev.Stat.1977, ch. 1112/3, par. 38.)Therefore, it is evident that a public utility has a duty to serve customers in its area if, upon application, they are deemed to be reasonably entitled to such service. We also note that municipalities, though specifically exempt ****1235 ***431** from regulation as a "public utility" (Ill.Rev.Stat.1977, ch. 1112/3, par. 10.3(1)), are also required by common law duty to serve all of their customers without unreasonable discrimination in rates or manner of service.Austin View Civic Association v. City of Palos Heights (1980), 85 Ill.App.3d 89, 40 Ill.Dec. 164, 405 N.E.2d 1256.

[7] Turning to the complaint in the instant matter, we find no allegations that plaintiffs were being served

by Northfield prior to its purchase, or that they had or would have suitable facilities for receiving such services. Moreover, there is no averment that plaintiffs ever applied to Northfield for water service or that Northfield would have been capable of providing it with service if it had so applied. In the absence of any allegation upon which we can conclude that plaintiffs would have been reasonably entitled to water service from Northfield, there is no basis for concluding that its successor, Glenview, assumed such duties. In sum, engrafting upon Glenview a duty to serve plaintiffs' property is unwarranted since it has pled no legal right to it. We will not speculate as to whether either Northfield or Glenview had the capacity to furnish plaintiff's property with water, since no allegations have been presented showing that they received such service in the past or that it was feasible to so furnish them in the future.

Cases cited by plaintiffs from other jurisdictions in support of their position render them no aid. Each is factually dissimilar to the present case and merits no discussion.

Plaintiffs next contend that Glenview is estopped from denying an obligation to supply them with water in view of "numerous representations" it made at public hearings before IDOT to obtain an increase in its allocation of Lake Michigan water.

[8][9] Two essential elements are prerequisites to invoking the doctrine of equitable estoppel against a municipality: (1) an affirmative act on the part of the municipality, and (2) the inducement of substantial reliance on the affirmative act (Lake Shore Riding Academy v. Daley (1976), 38 Ill.App.3d 1000, 350 N.E.2d 17.) Plaintiffs' complaint alleges that the "affirmative act" by Glenview which induced their reliance was its representation at the IDOT hearings that it was in the process of acquiring Northfield and that it would be responsible for providing water to all portions of the company's certificated area. After carefully reviewing the complaint and exhibits furnished to us by plaintiffs, we believe that the ***262** representations made by Glenview are insufficient as a matter of law to establish a cause of action for relief under an equitable estoppel theory. Glenview never stated that it would supply water to plaintiffs' property. It is undisputed that plaintiffs were not receiving service from Northfield at the time of the IDOT hearings, and that no application had been made to the water company for such service. Further, Glenview's request to IDOT for water did not include an estimate for a supply sufficient to furnish plaintiffs with water; it only contemplated a quantity for developments "already approved and under construction." The water allocations received were in compliance with these requests. Based upon these facts, we hold that there were no "affirmative acts" by Glenview sufficient to induce plaintiffs' reliance in expending money to develop their property.

[10] Plaintiffs also contend that Glenview, by its ordinance requiring annexation and conformance to its land use plans, violated the antitrust prohibitions of Ill.Rev.Stat.1977, ch. 38, par. 60-3.

Section 3 of the Illinois Antitrust Act provides in relevant part as follows:

"Every person shall be deemed to have committed a violation of this Act who shall:

(3) Establish, maintain, use or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce." (Ill.Rev.Stat.1977, ch. 38, par. 60-3(3).)

****1236 ***432** Plaintiffs' complaint alleges that Glenview violated section 3 when it acquired Northfield, "for the purpose of limiting the supply of water."The complaint further states that this purchase "has the effect of controlling and limiting the sale of water to persons outside the corporate limits of said Village," and that this conduct established a monopoly in the water supply business.

This contention is completely without merit, since the complaint alleges no facts to support a conclusion that Glenview violated section 3 of the Illinois Antitrust Act. (Ill.Rev.Stat.1977, ch. 38, par. 60-1, et seq.) First, the complaint reveals that Glenview refused service to plaintiffs' property. Having no desire to even serve plaintiffs' property, it can hardly be asserted that Glenview sought monopoly control over the water supply business in the area. Second, there are no facts establishing that Glenview attempted to maintain this alleged monopoly power over "any substantial part of trade or commerce of

this State," as required by section 3. Rather, ***263** the alleged violations occurred only in a single, isolated, unincorporated area outside Glenview. Finally, there were no facts set forth in the complaint showing that Glenview attempted to "exclude competition" or "control, fix or maintain" prices in the area.

Plaintiffs also argue that Glenview's conduct is actionable since its ordinance ties a collateral product (i. e., annexation) to the delivery of a regulated product (i. e., water).

[11][12][13][14] A tying arrangement is defined as an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different product. (Luster v. Jones (1979), 70 Ill.App.3d 1019, 27 Ill.Dec. 66, 388 N.E.2d 1029.) Such arrangements are per se illegal when,

"a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."Northern Pacific Ry. Co. v. United States (1958), 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545.

Tying arrangements are not specifically addressed by the Illinois Antitrust Act. Nevertheless, they are embraced under subsection (2) of section 3 of the Act if, tested by the "rule of reason," they are found to be injurious to competition. (Ill.Ann.Stat. ch. 38, par. 60-3, Historical and Practice Notes, at p. 460 (Smith-Hurd 1977).) Under the rule of reason, the court must consider the actor's purpose in entering into the arrangement, the nature of the conduct, the effect on the industry and the competitive climate in the industry.Blake v. H. F. Group Multiple Listing Service (1976), 36 Ill.App.3d 730, 345 N.E.2d 18.

[15] In the instant case, we initially note that plaintiffs' complaint fails to specifically allege that Glenview's conduct constitutes a "tying arrangement." The first mention of this particular theory is in plaintiffs' brief on appeal. Moreover, there is no explanation offered as to how this arrangement is injurious to competition. In any event, it is fundamental that tying arrangements contemplate an appreciable restraint on free competition in the tied product. In this case, the "tied product" is Glenview's annexation requirements. However, Glenview, as a municipality, is not competitively engaged in the market place for purposes of selling "annexation" as if it were a product or service. Indeed, there are no allegations that Glenview attempted to prevent "competing" municipalities from annexing the subject property by exerting leverage in the water supply business. Glenview has consistently maintained that it does not desire to provide water to plaintiffs' property. However, it will do so if, by annexation, it can compel plaintiffs to develop their land in conformance with Glenview's comprehensive land plan. Based upon the scenario, it is our opinion ***264** that Glenview's alleged "tying arrangement" neither had the purpose nor the effect of suppressing competition in the market. Therefore, we find no violations of our state antitrust laws.

Plaintiffs' last contention is that Count III of its complaint, requesting that IDOT be enjoined from allocating any additional water to Glenview, was improperly dismissed by the trial court. We disagree.

****1237 ***433** [16][17] In essence, Count III requests that Glenview be penalized by depriving it of water, since it has chosen not to serve the subject property. However, even if injunctive relief were granted plaintiffs, it would not benefit them or bring water to their development. Injunctive relief is properly refused where it is unnecessary and of no benefit to plaintiff. (See e. g. Elliott v. Nordlof (1967), 83 Ill.App.2d 279, 227 N.E.2d 547.) Consequently, the trial court's dismissal of Count III was proper.

For the reasons stated, the judgment of the circuit court is hereby affirmed.

Affirmed.

MEJDA and WILSON, JJ., concur.
Ill.App., 1981.
Amalgamated Trust and Sav. Bank v. Village of Glenview
98 Ill.App.3d 254, 423 N.E.2d 1230, 53 Ill.Dec. 426, 1981-2 Trade Cases P 64,279

END OF DOCUMENT

TAB 2

Doe v. Northwestern University
Ill.App. 1 Dist.,1997.

Appellate Court of Illinois,First District, Second Division.
John DOE, Anita Doe, Bertha Doe, Brian Doe, Carol Doe, and Laurel Doe, on Behalf of Themselves and Similarly Situated Persons, Plaintiffs-Appellants,
v.
NORTHWESTERN UNIVERSITY, and John Noe, Indiv. and as Their Agent, Defendants-Appellees.
No. 1-96-0067.

June 17, 1997.
Rehearing Denied July 23, 1997.

Six dental patients brought action for damages against university dental school and dental student for emotional harm they suffered after receiving letter from university informing them that dental student who participated in their treatment had tested positive for human immunodeficiency virus (HIV). The Circuit Court, Cook County, Julia Nowicki, J., dismissed, and patients appealed. The Appellate Court, McNulty, J., held that: (1) evidence that patients never tested positive for HIV was properly considered on motion to dismiss as evidence of affirmative matter related to argument for defeating claim; (2) evidence of extremely small probability of transmission of HIV from health care providers to patients was properly considered on motion to dismiss; (3) patients did not have cause of action for battery against dental student for treating them without disclosing that he tested positive for HIV after they consented to treatment; (4) provision of dental services for educational purposes was not "trade or commerce" within meaning of Consumer Fraud and Deceptive Business Practices Act; and (5) reasonable fears of patients being exposed to HIV based on participation in their treatment of dental student who had tested positive for HIV were not severe enough to warrant tort compensation.

Affirmed.

Divito, P.J., filed specially concurring opinion.

West Headnotes

[1] Pretrial Procedure 307A 682.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak682.1 k. In General. Most Cited Cases
Evidence that plaintiffs, who alleged that they suffered emotional harm after being notified that dental student who participated in their treatment had tested positive for human immunodeficiency virus (HIV), never tested positive for HIV was properly considered on motion to dismiss as evidence of affirmative matter related to argument for defeating claim. S.H.A. 735 ILCS 5/2-619.

[2] Pretrial Procedure 307A 682.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak682.1 k. In General. Most Cited Cases
Evidence of extremely small probability of transmission of human immunodeficiency virus (HIV) from health care providers to patients was properly considered on motion to dismiss dental patients' claims for emotional harm they suffered when dental clinic sent them letter informing them that dental student who participated in their treatment had tested positive for HIV. S.H.A. 735 ILCS 5/2-619.

[3] Assault and Battery 37 2

37 Assault and Battery
37I Civil Liability
37I(A) Acts Constituting Assault or Battery and Liability Therefor
37k1 Nature and Elements of Assault and

Battery
37k2 k. In General. Most Cited Cases
Patients did not have battery cause of action against dental student for treating them without disclosing that he tested positive for human immunodeficiency virus (HIV), where they consented to all of dental procedures; their cause of action for lack of informed consent was for negligence, not battery or assault.

[4] Antitrust and Trade Regulation 29T 257

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(D) Particular Relationships
29Tk254 Professionals
29Tk257 k. Medical Professionals; Doctor and Patient. Most Cited Cases
(Formerly 92Hk6 Consumer Protection)
Provision of dental services for educational purposes was not "trade or commerce" within meaning of Consumer Fraud and Deceptive Business Practices Act, so that patients could not bring claim under Act against dental school and one of its students for failing to inform them of student's human immunodeficiency virus (HIV) status. S.H.A. 815 ILCS 505/1 et seq.

[5] Contracts 95 337(3)

95 Contracts
95VI Actions for Breach
95k331 Pleading
95k337 Breach
95k337(3) k. Allegation of Damage. Most Cited Cases

Damages 115 149

115 Damages
115VIII Pleading
115k149 k. Mental Suffering and Emotional Distress. Most Cited Cases

Fraud 184 47

184 Fraud
184II Actions
184II(C) Pleading
184k47 k. Damage from Fraud. Most Cited Cases

Health 198H 813

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk813 k. Pleading. Most Cited Cases
(Formerly 299k18.40 Physicians and Surgeons)
Plaintiff must allege legally cognizable damages to plead cause of action for common law fraud, breach of fiduciary duty, intentional infliction of emotional distress, breach of contract, or medical malpractice.

[6] Damages 115 57.9

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.8 Nature of Injury or Threat in General
115k57.9 k. In General. Most Cited Cases
(Formerly 115k48)
Emotional distress is legally cognizable damage only where distress is particularly severe.

[7] Damages 115 57.34

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.34 k. Aids/Hiv. Most Cited Cases
(Formerly 115k49.10)
Reasonable fears of patients being exposed to human immunodeficiency virus (HIV) based on participation in their treatment of dental student who had tested positive for HIV were not severe enough to warrant tort compensation, where patients knew of only

remote possibility that student infected with HIV may have, unbeknown to them, bled while treating them using inadequate precaution, and while they had blood vessels sufficiently exposed for communication of virus, and their negative HIV tests accorded with these low probabilities.

[8] Damages 115 57.31

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.31 k. In General. Most Cited Cases
(Formerly 115k49.10)
Reasonable fears are not compensable damages unless they reach level of severity that would be inconsistent with extremely remote, insubstantial possibility of contracting disease.

[9] Damages 115 57.16(2)

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.13 Negligent Infliction of Emotional Distress
115k57.16 Nature of Injury or Threat
115k57.16(2) k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases
(Formerly 115k50)
Plaintiff who has suffered physical impact and injury due to defendant's negligence may recover for emotional distress that injury directly causes.

[10] Damages 115 57.10

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.8 Nature of Injury or Threat in General
115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases
(Formerly 115k48)
Recovery for emotional distress requires medically verifiable manifestations of severe emotional distress.

[11] Damages 115 57.31

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.31 k. In General. Most Cited Cases
(Formerly 115k49.10)
Small probability of contracting disease must be balanced against probable harm if disease is contracted to determine whether plaintiff has alleged adequate grounds for recovering for severe emotional distress.

[12] Damages 115 57.31

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.31 k. In General. Most Cited Cases
(Formerly 115k49.10)
Even foreseeable fear of deadly disease may not be compensable as severe emotional distress if feared contingency is too unlikely.

[13] Damages 115 57.31

115 Damages

115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.31 k. In General. Most Cited Cases
(Formerly 115k49.10)
Where hysterical fear of disease is sufficiently widespread, and popular knowledge concerning its etiology is limited, plaintiff may foreseeably experience severe emotional distress without medically verifiable evidence of substantially increased risk of contracting disease.

[14] Damages 115 62(2)

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k62 Duty of Person Injured to Prevent or Reduce Damage
115k62(2) k. Personal Injuries. Most Cited Cases
Restriction on recovery for emotional distress from exposure to disease to fears supported by medical evidence of increased risk of contracting disease effectively requires plaintiffs to mitigate their fears by learning what they can about likelihood that they have contracted disease.

[15] Damages 115 57.34

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.30 Fear of Developing Disease
115k57.34 k. Aids/Hiv. Most Cited Cases
(Formerly 115k49.10)
Plaintiffs who fear that they have contracted acquired immune deficiency syndrome (AIDS) because of defendant's negligence should recover damages for time in which they reasonably feared substantial, medically verifiable possibility of contracting AIDS.

****147*41***586** Donald G. Weiland, Chicago, Michael Closen, Chicago, for Plaintiffs-Appellants.
Sidley & Austin, Chicago (Frederic J. Artwick, Anne E. Rea, of counsel), Amy D. Mayber, Assoc. General Counsel of Northwestern University, Evanston, for Defendants-Appellees.

Justice McNULTY delivered the opinion of the court:
The six fictitiously named plaintiffs sued Northwestern University and a dental student from Northwestern's dental school for emotional harm they suffered when Northwestern sent the plaintiffs a letter informing them that a dental student who participated in their treatment had tested positive for human immunodeficiency virus (HIV), the virus that causes acquired immune deficiency syndrome (AIDS). Defendants moved to dismiss for failure to state a cause of action, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615(b) (West 1994)), and they separately moved to dismiss pursuant to section 2-619 (735 ILCS 5/2-619(a)(9) (West 1994)). Plaintiffs appeal from the trial court's judgment dismissing the complaint with prejudice.

The six fictitiously named plaintiffs received various treatments from several students in Northwestern's dental clinic during 1990 and 1991. On July 22, 1991, Northwestern sent a letter to all six plaintiffs, along with numerous other patients, stating:

"Recently we learned that a dental student involved in providing care to you in the Dental Clinic has tested positive for HIV * * *.

***42** We believe, based on the most current and reliable scientific evidence, that the likelihood that you were infected with the HIV virus as a result of contact with this student is extremely low. All persons providing dental care are required to follow precautions designed to prevent the communication of diseases, including HIV. These precautions have been taken. However, *we strongly recommend that you be tested for the presence of the virus.*

The Northwestern University Dental School is offering free testing for HIV."(Emphasis in original.)

Because defendants did not in the letter identify the infected student, plaintiffs feared that any of the students may have been infected. Plaintiffs' attorneys later determined the identity of the infected student, whom they then sued under the fictitious name of John Noe. Noe worked in Northwestern's dental clinic from June 1990 until July 1991. He participated in electrosurgery to reduce Anita Doe's gums and in a root canal performed on her in July and August 1990. He diagnosed Laurel Doe's fractured tooth and participated in a tooth extraction in September 1990. He took X rays of Bertha Doe's teeth in March 1991. Noe treated John Doe several times over the course of his year in the clinic. The last treatment was a tooth cleaning Noe performed on May 23, 1991. Anita, Laurel and John bled during Noe's treatments. Noe cemented a loose tooth for Brian Doe in August 1990, and he took Carol Doe's blood pressure while discussing oral hygiene with her in February 1991.

****148 ***587** Plaintiffs allege that both Noe and Northwestern knew Noe had tested positive for HIV by August 1990, when he treated Anita Doe. Defendants presented affidavits denying both the testing and the knowledge, and the concurrence relies on this evidence to support its assertion that defendants here acted promptly and responsibly. However, the affidavits merely contradict an ultimate fact stated in the complaint. See *Inland Real Estate Corp. v. Lyons Savings & Loan*, 153 Ill.App.3d 848, 854, 106 Ill.Dec. 852, 506 N.E.2d 652 (1987). While the evidence might have some relevance to a motion for summary judgment, it has no bearing on the motions to dismiss pursuant to section 2-615 or 2-619. *Cioni v. Gearhart*, 201 Ill.App.3d 853, 856-57, 147 Ill.Dec. 321, 559 N.E.2d 494 (1990) Accordingly, we ignore that evidence for review of the order dismissing the complaint. We assume that Noe tested positive for HIV, and Northwestern knew of that positive test, prior to August 1990.

Plaintiffs further alleged:

"Accidental blood trauma to the hands and fingers of dental practitioners can occur during the performance of invasive dental procedures such as teeth cleaning, extractions, fillings, drilling, root canals, injections, and other dental surgeries."

***43** They claimed the traumas could occur even though neither the patient nor the practitioner knew of the trauma, and sometimes practitioners might conceal from their patients the occurrence of such trauma. Plaintiffs alleged that some of the students sometimes failed to use all proper barrier precautions, like gloves. Plaintiffs did not allege that any of them knew or believed that any dental student suffered such trauma while treating them.

Plaintiffs brought a complaint in 12 counts. In the first count they sought certification of the class of all persons who received Northwestern's letter, with the six fictitiously named plaintiffs as class representatives. For all subsequent counts, plaintiffs separated those whom Noe invasively treated from plaintiffs who received no such treatment. According to plaintiffs, Anita, Laurel, Bertha and John Doe received invasive treatment, while Noe never invasively treated Brian or Carol Doe. The invasively treated plaintiffs charged defendants with breach of fiduciary duty (count II), intentional infliction of emotional distress (count IV), battery (count VI), common law fraud (count VII), consumer fraud (count XII), breach of contract (count VIII), and negligent malpractice (count X). Brain and Carol sued for breach of fiduciary duty (count III), intentional infliction of emotional distress (count V), breach of contract (count IX), and dental malpractice (count XI).

[1][2] In counts II through XII, plaintiffs alleged they "suffered physical distress and discomfort and mental pain and anguish upon learning of the possibility of infection with HIV."Plaintiffs do not allege that any of them have ever tested positive for HIV, and in response to defendants' request, the named plaintiffs admitted that they never tested positive for HIV. This is evidence of an affirmative matter related to an argument for defeating the claim, properly considered on a motion to dismiss pursuant to section 2-619. *Goldstein v. Lustig*, 154 Ill.App.3d 595, 602, 107 Ill.Dec. 500, 507 N.E.2d 164 (1987). Defendants also presented the conclusions of studies which found only a very small chance of transmission of HIV in the course of medical treatment. Although plaintiffs in their complaint emphasized that researchers could not rule out the possibility of HIV transmission from health care providers to patients, they did not allege any particular level of probability of transmission. Defendants' evidence of an extremely small probability of such transmission is properly before

the court on review of the section 2-619 motion.

The trial court dismissed counts II through XII for failure to allege actual exposure to HIV, finding that allegation necessary for recovery of damages for fear of contracting AIDS. While plaintiffs on appeal contest the requirement of actual exposure, they do not ***44** dispute the trial court's finding that "[a]s to all counts, the plaintiffs' damages are predicated on the fear of contracting * * * HIV."The court dismissed count I and denied the motion for class certification because the named plaintiffs had no cause of action.

****149 ***588** Plaintiffs seek reversal of the judgment as to all counts. They argue that they have stated a cause of action for battery because they never consented to treatment by a student infected with HIV. To state a cause of action for a battery in the course of health care, the plaintiff must allege

"a total lack of consent to medical procedures * * *. * * * The defendants' privilege is limited at least to acts *substantially similar* to those to which the plaintiffs consented. If the defendants went beyond the consent given, to perform substantially different acts, they will be liable under a theory of battery." (Emphasis in original.) *Gaskin v. Goldwasser*, 166 Ill.App.3d 996, 1012, 117 Ill.Dec. 734, 520 N.E.2d 1085 (1988).

The United States Court of Appeals for the Seventh Circuit explained:
"Illinois law distinguishes between medical malpractice cases alleging no informed consent and those claiming a total lack of consent to the medical procedure in question. [Citation.] Informed consent cases concern the duty of a physician who has obtained consent to perform a medical procedure to disclose fully the risks associated with that procedure. Such cases are viewed as negligence actions. Total lack of consent cases involve a physician who undertakes to treat a patient without the patient's consent; absent consent, it is meaningless to require the disclosure of risks necessary to an 'informed' decision. Rather, total lack of consent cases are treated as batteries because they involve an intentional unauthorized touching of the person of another." *Lojuk v. Quandt*, 706 F.2d 1456, 1460 (7th Cir.1983).

[3] Plaintiffs here consented to all of the dental procedures; they did not know about risks associated with the procedures when Dr. Noe performed them. In *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993), the plaintiff sued a doctor for performing surgery on him without disclosing that the doctor was HIV positive. The court rejected the battery claim, holding that "[t]he cause of action for lack of informed consent is one in tort for negligence, as opposed to battery or assault." *Faya*, 329 Md. at 450 n. 6, 620 A.2d at 334 n. 6; see also W. Keeton, Prosser & Keeton on Torts § 18, at 120-21 (5th ed.1984). We agree. Plaintiffs separately stated their cause of action for negligence and dental malpractice based on the failure to obtain informed consent. Therefore we affirm dismissal of count VI, in which plaintiffs sought recovery for battery.

[4] Plaintiffs also argue that they have stated a cause of action for ***45** violation of the Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 505/1*et seq.* (West 1992)), by alleging that defendants intended plaintiffs to rely on their deceptive failure to inform plaintiffs of Noe's HIV status and that the deception occurred in the course of commerce. See *Siegel v. Levy Organization Development Co.*, 153 Ill.2d 534, 542, 180 Ill.Dec. 300, 607 N.E.2d 194 (1992). *In Frahm v. Urkovich*, 113 Ill.App.3d 580, 69 Ill.Dec. 572, 447 N.E.2d 1007 (1983), this court held that the Act does not apply to the actual practice of law. The court extended the holding of *Frahm* to medical services in *Feldstein v. Guinan*, 148 Ill.App.3d 610, 615, 101 Ill.Dec. 947, 499 N.E.2d 535 (1986), holding that "[t]he practice of medicine is not the equivalent of an ordinary commercial enterprise." Following *Feldstein* and *Frahm*, we hold that the provision of dental services for educational purposes does not constitute "trade or commerce" within the meaning of the Act. 815 ILCS 505/2 (West 1992). Hence, we affirm dismissal of count XII, charging violation of the Act, for failure to state a claim.

[5] The plaintiff must allege legally cognizable damages to plead a cause of action for common law fraud (*People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill.2d 473, 490, 180 Ill.Dec. 271, 607 N.E.2d 165 (1992)), breach of fiduciary duty (*Suppressed v. Suppressed*, 206 Ill.App.3d 918, 925, 151 Ill.Dec. 830, 565 N.E.2d 101 (1990); *Chicago City Bank & Trust Co. v. Lesman*, 186 Ill.App.3d 697, 701, 134 Ill.Dec. 478, 542 N.E.2d 824 (1989)),

intentional infliction of emotional distress (*McGrath v. Fahey*, 126 Ill.2d 78, 86, 127 Ill.Dec. 724, 533 N.E.2d 806 (1988)), breach of contract (****150***589***National Underground Construction Co. v. E.A. Cox Co.*, 216 Ill.App.3d 130, 136, 159 Ill.Dec. 614, 576 N.E.2d 283 (1991)), or medical malpractice (*Addison v. Whittenberg*, 124 Ill.2d 287, 297, 124 Ill.Dec. 571, 529 N.E.2d 552 (1988)). For all of these counts, we assume that plaintiffs have adequately alleged facts establishing defendants' duties to plaintiffs and showing that defendants breached those duties. We confine our discussion to the adequacy of the allegations of damages.

[6][7] Emotional distress constitutes legally cognizable damage only where the distress is particularly severe. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *McGrath*, 126 Ill.2d at 86, 127 Ill.Dec. 724, 533 N.E.2d 806. Plaintiffs suggest that AIDS causes such severe panic that any reasonable fear of AIDS should be compensable, even without proof of "actual exposure." See *Faya*, 329 Md. at 455, 620 A.2d at 336-37; *Castro v. New York Life Insurance Co.*, 153 Misc.2d 1, 588 N.Y.S.2d 695 (Sup.Ct.1991); *Williamson v. Waldman*, 291 N.J.Super. 600, 677 A.2d 1179 (App.Div.1996), *cert. granted*147 N.J. 259, 686 A.2d 761 (1996). Defendants cite more numerous cases requiring "actual exposure." *E.g.*, ***46***Carroll v. Sisters of Saint Francis Health Services, Inc.*, 868 S.W.2d 585, 594 (Tenn.1993); *Russaw v. Martin*, 221 Ga.App. 683, 686, 472 S.E.2d 508, 512 (1996). In *Doe v. Surgicare of Joliet, Inc.*, 268 Ill.App.3d 793, 797, 205 Ill.Dec. 593, 643 N.E.2d 1200 (1994), the court held that in the absence of proof of actual exposure, the plaintiff's fear of AIDS was "unreasonable as a matter of law."

In *Williamson* the court criticized the reasoning of cases requiring proof of actual exposure:

"It cannot validly be said, as a matter of law, in the light of common knowledge, that a person who receives a puncture wound from medical waste reacts unreasonably in suffering serious psychic injury from contemplating the possibility of developing AIDS, even if only for some period of time, until it is no longer reasonable, following a series of negative tests, to apprehend that result. * * *

* * * * * *

* * * [C]ourts ought not to be unduly reluctant to reach results consonant with the reasonable reactions of real people as long as basic principles of tort law are preserved, including those that preclude the creation of duties that reasonably thoughtful defendants would not foresee." *Williamson*, 291 N.J.Super. at 604-05, 677 A.2d at 1181.

See also *Surgicare*, 268 Ill.App.3d at 799-802, 205 Ill.Dec. 593, 643 N.E.2d 1200 (Barry, J., dissenting).

The plaintiff in *Williamson* punctured herself on a sharp instrument improperly left in the trash. She did not know whether the instrument had been in contact with an HIV-positive person, but she feared that she contracted HIV. The court held:

"[AIDS] is a disease universally dreaded by the lay public. Under those circumstances, it cannot be concluded as a matter of law that the plaintiff reacted unreasonably or unforeseeably. Fearing that she faced serious injury as a result of exposure to HIV, it was not unreasonable that she would be greatly upset during the period of time that was necessary to obtain medical assurance that she was not infected. It may very well be that there is some period of time after receiving a puncture wound from medical waste during which any person would experience a range of mental reactions, from mere anxiety to actionable emotional distress, and ought to be eligible for compensation therefor if she meets the required tests, including the serious injury standard applying to all claims based upon infliction of emotional distress." *Williamson*, 291 N.J.Super. at 605-06, 677 A.2d at 1181.

[8] Although we are persuaded by the reasoning of *Williamson* that a reasonable person in plaintiffs' situation would foreseeably fear that he or she might have contracted HIV, we disagree with that court's conclusion that the complaint must, therefore, state a compensable***47** claim. *Williamson*, in effect, creates a special rule for fear of AIDS as opposed to other fears: that decision allows compensation for any reasonable fear of AIDS, regardless of the remoteness of the medically verifiable possibility of contracting ****151 ***590** the disease. This creates a special AIDS exception to the general rule that not all reasonable fears are compensable. See *Allen v. Otis*

Elevator Co., 206 Ill.App.3d 173, 150 Ill.Dec. 699, 563 N.E.2d 826 (1990). In Illinois reasonable fears are not compensable unless they reach a level of severity that would be inconsistent with an extremely remote, insubstantial possibility of contracting disease. See *Wetherill v. University of Chicago*, 565 F.Supp. 1553 (N.D.Ill.1983).

[9][10] A plaintiff who has suffered a physical impact and injury due to a defendant's negligence may recover for emotional distress that the injury directly causes. *Carlinville National Bank v. Rhoads*, 63 Ill.App.3d 502, 503, 20 Ill.Dec. 386, 380 N.E.2d 63 (1978). However, commentators have argued that courts should limit recovery for emotional distress, including fear, because of

"(1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act." W. Keeton, Prosser & Keeton on Torts § 54, at 360-61 (5th ed.1984).

See *Corgan v. Muehling*, 143 Ill.2d 296, 309, 158 Ill.Dec. 489, 574 N.E.2d 602 (1991). Illinois courts address these concerns by requiring medically verifiable manifestations of severe emotional distress. See *Corgan*, 143 Ill.2d at 311-12, 158 Ill.Dec. 489, 574 N.E.2d 602. In *Allen*, 206 Ill.App.3d at 183-84, 150 Ill.Dec. 699, 563 N.E.2d 826, the plaintiffs foreseeably experienced fear, with physical manifestations of distress, as a result of the defendant's negligence, but the court held that the foreseeable fear and distress did not:reach a degree of severity that justified tort compensation. Thus, not all negligently caused fears are compensable.

The concerns raised by Keeton and addressed in *Corgan* particularly apply to claims that a defendant's negligence has caused a plaintiff to fear future illness. These concerns should lead courts in such cases to restrict recovery to compensation for severe emotional distress arising from serious fear occasioned by a substantial, medically verifiable, possibility of contracting the disease. In Wetherill the court, interpreting Illinois law, found that a plaintiff claiming that a physical impact caused fear of cancer needed to prove "a reasonable fear, not a high degree of likelihood" of contracting the feared illness. *Wetherill*, 565 F.Supp. at 1559. The court noted that "the ***48** distinction is meaningful, for fears of future injury can be reasonable even where the likelihood of such injury is relatively low." *Wetherill*, 565 F.Supp. at 1559. The court emphasized that the plaintiffs in that case could present medical evidence of studies showing that they had an increased risk of developing cancer as a result of the defendants' negligence.

[11][12] A small probability of contracting disease must be balanced against the probable harm if the disease is contracted to determine whether a plaintiff has alleged adequate grounds for recovering for severe emotional distress. We emphasize that the relatively minor fears of the plaintiffs in *Allen* are not comparable to a real, foreseeable fear of AIDS, such as plaintiffs in this case suffered; however, even a foreseeable fear of deadly disease may not be compensable if the feared contingency is too unlikely.

[13][14] Where hysterical fear of a disease is sufficiently widespread, and popular knowledge concerning its etiology is limited, a plaintiff may foreseeably experience severe emotional distress without medically verifiable evidence of a substantially increased risk of contracting the disease. Most courts have held that recovery for fear of disease should not extend to such foreseeable fears, because, as commentators have noted, such broad recovery rewards ignorance about the disease and its causes. See Note, *The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 St. John's L.Rev. 77 (1993); J. Maroulis, *Can HIV-Negative Plaintiffs Recover Emotional Distress Damages for Their Fear of AIDS*, 62 Fordham L.Rev. 225 (1993). Courts have accordingly restricted recovery ****152 ***591** to fears supported by medical evidence of an increased risk of contracting disease. See *Wetherill*, 565 F.Supp. at 1559-60; *Vallery v. Southern Baptist Hospital*, 630 So.2d 861, 866 (La.App.1993); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 528-29 (Fla.App.1985); but see *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351, 353 (La.1974). The restriction on recovery effectively requires plaintiffs to mitigate their fears by learning what they can

about the likelihood that they have contracted the disease. Thus, the restriction on recovery is an aspect of each plaintiff's

"active duty of making reasonable exertions to render the injury as light as possible. If, by * * * negligence or wilfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him." *Culligan Rock River Water Conditioning Co. v. Gearhart*, 111 Ill.App.3d 254, 258, 66 Ill.Dec. 902, 443 N.E.2d 1065 (1982).

[15] We find that plaintiffs who fear that they have contracted AIDS ***49** because of a defendant's negligence should recover damages for the time in which they reasonably feared a substantial, medically verifiable possibility of contracting AIDS. The reasonable, compensable fear does not include the augmentation of that fear due to ignorance concerning AIDS and its transmission. We believe this reasoning is compatible with the results of most cases requiring proof of "actual exposure": while any person stuck with a used needle should, reasonably, fear the possibility of contracting AIDS, this reasonable fear is not of a sufficient degree to be compensable, unless the plaintiff faces a particularly substantial risk of HIV infection, as, for instance, when the plaintiff learns that the used needle probably held bodily fluids of a person who had HIV. As the court said in *Vallery*, 630 So.2d at 867:

"To recognize a cause of action * * * when the presence of HIV is not shown (or, at the pleading stage, alleged), is clearly unsound. Fear in such situations may be genuine but it is based on speculation rather than fact."

Accord *De Milio v. Schrager*, 285 N.J.Super. 183, 201, 666 A.2d 627, 634 (1995).

The concurrence accuses us of "stop[ping] short" and adopting a "lesser standard" than the "actual exposure" requirement the concurrence espouses. The standard adopted herein is distinct from, not lesser than, the "actual exposure" requirement. Under the standard stated herein, a plaintiff who has proved an "actual exposure" will recover no damages if she presents insufficient evidence that she feared a substantial, medically verifiable possibility of contracting AIDS. Under the standard the concurrence espouses, a plaintiff may recover damages for an "actual exposure," even without evidence that she knew facts showing a substantial possibility of contracting the disease.

The concurrence presents no reason to believe the "actual exposure" requirement addresses relevant policy considerations any better than the test we adopt. In particular, the substantial, medically verifiable possibility test directly addresses the degree to which a plaintiff's fears are based on speculation or public misconceptions rather than verifiable medical evidence of risk. As the concurrence correctly points out, under the standard we adopt, litigation will focus on differing opinions as to what level of medically verified risk qualifies as a substantial possibility of contracting AIDS. We believe that this is precisely the proper focus for litigation. The parties should marshal medical evidence of the possibility of contracting the disease and argue as to whether that possibility is so substantial as to merit compensation. The rhetoric of the concurrence would instead focus ***50** the attention of litigants and the courts on the less informative issue of whether the occurrence qualifies as an "actual" exposure.

Developing case law on the medically verifiable statistical possibilities should bring convergence to a reasonable standard for compensation. The results under this standard could hardly be more divergent than have been the results of cases purportedly applying the "actual exposure" test. For example, in ****153***592***Burk v. Sage Products, Inc.*, 747 F.Supp. 285, 287 (E.D.Pa.1990), where an improperly discarded needle on a hospital floor with AIDS patients stuck the plaintiff, the court held that any question concerning exposure to HIV was sufficient to defeat the claim. In *Vallery*, 630 So.2d at 867-68, the plaintiff alleged only that an HIV-positive patient bled onto the plaintiff's unprotected hand. The court found the allegations sufficient to state a claim for relief, although the plaintiff did not allege that he had any open sores or cuts and the court noted the need for expert testimony. Compare also *Surgicare*, 268 Ill.App.3d 793, 205 Ill.Dec. 593, 643 N.E.2d 1200; *De Milio*, 285 N.J.Super. at 198-99, 666 A.2d at 634-35.

The standard we adopt meets the need for proof that the fear has a genuine basis, not based on public

misconceptions, and given the inconsistent application of "actual exposure," the proposed test seems to have a better chance for consistent application. The concurrence presents no convincing advantage to be gained by adopting the "actual exposure" requirement rather than requiring plaintiffs to present evidence that they knew facts that showed a substantial, medically verifiable possibility of contracting the feared disease.

Here, plaintiffs received letters informing them that a dental student involved in their treatment tested positive for HIV. The letters also said that the plaintiffs faced an extremely low likelihood of HIV infection. Although plaintiffs alleged that some dental students sometimes failed to use proper precautions, they did not allege that any plaintiff saw any dental student bleed. Thus, when they received the letters, plaintiffs knew of only a remote possibility that the student infected with HIV may have, unbeknown to the plaintiffs, bled while treating a plaintiff, while using inadequate precautions, and while plaintiffs had blood vessels sufficiently exposed for communication of the virus. They have alleged no adequate reason for disbelieving defendants' statement that the likelihood of infection was extremely low. Plaintiffs' negative HIV tests accorded with the probabilities.

Defendants' letter itself shows that plaintiffs had reason to fear that they might have been infected with HIV. However, not all reasonable fears of AIDS are compensable. Plaintiffs have not alleged facts that could support a finding that they faced more than an ***51** extremely remote possibility of contracting AIDS. In the absence of a particularly substantial risk of HIV infection, plaintiffs' reasonable fears were not severe enough to warrant tort compensation. Plaintiffs have not suffered legally cognizable damages due to defendants' alleged malpractice, fraud, intentional infliction of emotional distress, or breaches of fiduciary duty or contract. We affirm the trial court's decision dismissing those counts of the complaint. Because the trial court correctly dismissed the named plaintiffs' alleged causes of action, it properly denied the motion for class certification and dismissed count I, the class action count. See *Evans v. International Village Apartments*, 165 Ill.App.3d 1048, 1051, 117 Ill.Dec. 568, 520 N.E.2d 919 (1988).

The trial court properly dismissed count VI, the battery claim, because plaintiffs stated an action only for a failure to inform them of a risk, not for proceeding with a complete lack of consent. Count XII fails to state a claim for violation of the Consumer Fraud Act because the Act does not apply to the school's normal practice of dentistry. The court properly dismissed counts II through V and VII through XI, pursuant to section 2-619 (735 ILCS 5/2-619(a)(9) (West 1994)), on the basis of defendants' affirmative evidence that plaintiffs' reasonable fears never attained compensable severity. Because plaintiffs never faced a medically verified substantial risk of contracting HIV, they did not suffer legally cognizable damages. In view of the dismissal of all other counts, the court correctly dismissed the class action count. Accordingly, we affirm the judgment dismissing the complaint in its entirety.

Affirmed.

TULLY, J., concurs.
DiVITO, P.J., specially concurs.Presiding Justice DiVITO specially concurring:
Although I agree with the result reached by the majority and with much of its analysis,,****154 ***593** I disagree with the standard it applies to determine whether a fear of HIV infection is compensable. According to the majority, plaintiffs may recover damages "for the time in which they reasonably feared a substantial, medically verifiable possibility of contracting AIDS."Op. at 591 of 224 Ill.Dec., at 152 of 682 N.E.2d. The majority states that this standard is compatible with cases requiring plaintiffs to prove actual exposure to the virus in order to recover damages based on a fear of HIV infection, but it stops short of requiring actual exposure. I write separately because I believe that an actual exposure requirement is preferable.

***52** According to the majority, plaintiffs' fears of HIV infection were reasonable but not severe enough to warrant tort compensation. The majority states that plaintiffs' fears would have been compensable if they had faced "a particularly substantial risk of HIV infection," but because they did not face more than an extremely remote possibility of contracting AIDS, they did not suffer legally cognizable damages. Op. at 592 of 224 Ill.Dec., at 153 of 682 N.E.2d. While I agree that plaintiffs failed to show that they suffered legally cognizable damages, I believe that the compensability of a claim for fear of HIV infection

should depend on proof that a plaintiff was actually exposed to the virus.

To establish actual exposure, a plaintiff must show that HIV was present in the alleged disease-transmitting agent and that a medically-accepted channel of transmission for the virus existed. See *Madrid v. Lincoln County Medical Center*, 122 N.M. 269, 923 P.2d 1154, 1160 (1996); see also *Vallery v. Southern Baptist Hosp.*, 630 So.2d 861, 867 (La.App.1993) (plaintiff must show both the presence of the virus and a channel of transmission); *Brown v. New York City Health & Hospitals Corp.*, 225 A.D.2d 36, 648 N.Y.S.2d 880, 886 (1996) (requiring proof of actual exposure, that is, "proof of both a scientifically-accepted method of transmission of the virus (in this case a needle puncture) and that the source of the allegedly transmitted blood or fluid was in fact HIV-positive (in this case the unfortunate infant")); *Bain v. Wells*, 936 S.W.2d 618 (Tenn.1997) (requiring evidence of actual exposure to the virus and evidence of a medically recognized channel of transmission).

The application of the actual exposure requirement is supported by a third district decision in this state, *Doe v. Surgicare of Joliet, Inc.*, 268 Ill.App.3d 793, 205 Ill.Dec. 593, 643 N.E.2d 1200 (1994), *appeal denied*,158 Ill.2d 550, 206 Ill.Dec. 835, 645 N.E.2d 1357 (1994), as well as by decisions in a majority of jurisdictions. See, *e.g.*, *Brzoska v. Olson*, 668 A.2d 1355 (Del.1995); *Russaw v. Martin*, 221 Ga.App. 683, 472 S.E.2d 508 (1996); *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994); *Vallery v. Southern Baptist Hosp.*, 630 So.2d 861 (La.App.1993); *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn.1995); *Bain v. Wells*, 936 S.W.2d 618 (Tenn.1997); *Drury v. Baptist Memorial Hosp. System*, 933 S.W.2d 668 (Tex.App.1996); *FuneralServices by Gregory, Inc. v. Bluefield Community Hosp.*, 186 W.Va. 424, 413 S.E.2d 79 (1991), *rev'd on other grounds*, *Courtney v. Courtney*, 190 W.Va. 126, 437 S.E.2d 436 (1993); *Babich v. Waukesha Memorial Hosp., Inc.*, 205 Wis.2d 690, 556 N.W.2d 144 (Wis.App.1996); but see *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993); *Williamson v. Waldman*, 291 N.J.Super. 600, 677 A.2d 1179 (App.Div.1996).

The reasoning of these cases is persuasive. For example, in ***53***Brown v. New York City Health & Hospitals Corp.*, 225 A.D.2d 36, 648 N.Y.S.2d 880, 886 (1996), the court required a showing of actual exposure in a negligence case based on a fear of developing AIDS. The court stated that the actual exposure requirement would insure that a plaintiff's, fear of developing the disease has a genuine basis, that a plaintiff's fear is not based on public misconceptions, and that cases involving claims based on a fear of HIV infection are treated consistently. The court further explained:

"Because an 'AIDS-phobia' cause of action is based on a potential future injury, the requirement of proof of actual exposure is necessary in order to insure that such a cause of action remains within the bounds of what is considered reasonably possible. The fear of contracting AIDS depends not only upon the likelihood that the virus was transmitted during a specific ****155 ***594** incident but also upon the likelihood that infection will develop. As one court noted, the statistical probability of contracting HIV from a single needle stick, assuming the needle was contaminated, is approximately 0.3 to 0.5 percent. Thus, the risk of exposure to HIV where the needle cannot be traced to a previous user is less than that, although it cannot be mathematically calculated [citation]." *Brown*, 648 N.Y.S.2d at 887.

See also Brzoska, 668 A.2d at 1362-64; *Russaw*, 472 S.E.2d at 511.

The court in *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn.1995), also listed a number of policy considerations that support an actual exposure requirement:

"Proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental and malpractice insurance, medical and dental care, prescription drugs, and blood products. Juries deliberating in fear of AIDS lawsuits would be just as likely to reach inconsistent results, discouraging early resolution or settlement of such claims. Last but not least, the coffers of defendants and their insurers would risk being emptied to pay for the emotional suffering of the many plaintiffs uninfected by exposure to HIV or AIDS, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted." *K.A.C.*, 527 N.W.2d at 559-60, quoting *Kerins v. Hartley*, 27 Cal.App.4th 1062, 33

Cal.Rptr.2d 172 (1994).

For these reasons, I would require proof of actual exposure as a prerequisite to recovery in cases based on a fear of HIV infection.

In this case, plaintiffs alleged breach of contract, breach of fiduciary duty, fraud, intentional infliction of emotional distress, and ***54** medical negligence. For all of these claims, the damages plaintiffs alleged were their fears of HIV infection. For breach of contract and tort actions, such as these, however, a defendant is liable only for consequences that were the proximate result of its conduct and is not liable for speculative damages. See *Feldstein v. Guinan*, 148 Ill.App.3d 610, 613, 101 Ill.Dec. 947, 499 N.E.2d 535 (1986); *DMI, Inc. v. Country Mutual Insurance Co.*, 82 Ill.App.3d 113, 115, 37 Ill.Dec. 803, 402 N.E.2d 805 (1980). Because plaintiffs failed to allege actual exposure, their fears were based on speculation and cannot be said to have resulted from defendants' conduct. Consequently, their damages are not legally cognizable. See, *e.g.*, *Russaw v. Martin*, 221 Ga.App. 683, 472 S.E.2d 508 (1996) (without proof of actual exposure, the plaintiffs' fears were unreasonable, and damages cannot be based on imagined possibilities); *Bain v. Wells*, 936 S.W.2d 618 (Tenn.1997) (plaintiff failed to establish proximate cause for negligent infliction of emotional distress because he offered no evidence of actual exposure); *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*, 186 W.Va. 424, 413 S.E.2d 79 (1991), *rev'd on other grounds*, *Courtney v.Courtney*, 190 W.Va. 126, 437 S.E.2d 436 (1993) (plaintiff had no legally compensable injury because, without proof of actual exposure, his fear was unreasonable); *Drury v. Baptist Memorial Hospital System*, 933 S.W.2d 668 (Tx.Ct.App.1996) (a fear of HIV infection that would support an award for mental anguish must be reasonably based on circumstances showing actual exposure to a disease-causing agent; because plaintiff failed to allege actual exposure, her fear was unreasonable and, therefore, she had no damages).

Although the majority suggests a standard that approaches the actual exposure requirement, I believe that a lesser standard is insufficient. We should require proof of actual exposure because, in addition to other public policy benefits, this standard is easier to understand and to apply. The majority states that a plaintiff should be able to recover for a fear of HIV infection if she shows she had a reasonable fear of a "substantial, medically verifiable possibility of contracting AIDS" (op. at 591 of 224 Ill.Dec., at 152 of 682 N.E.2d). I endorse the actual exposure standard because I fear that differing opinions as to what is a "substantial possibility" of HIV infection will lead to increased litigation and divergent results in cases involving a fear of HIV infection.

The actual exposure requirement is particularly helpful to controlling litigation in cases ****156 ***595** such as this, where much of the damages plaintiffs allege arise from the letter they received. We should commend health care providers for taking the initiative to advise patients of a risk of HIV infection, not penalize them for doing so. By requiring***55** proof of actual exposure, courts establish a principle of law that encourages timely notification, which is critical in controlling further spread of the virus. See also 410 ILCS 325/5.5(b) (West 1993) (providing for the notification of patients of an HIV-infected health care provider). The uncertainty associated with a lesser standard, on the other hand, may discourage notification.

For these reasons, I specially concur.

Ill.App. 1 Dist.,1997.
Doe v. Northwestern University
289 Ill.App.3d 39, 682 N.E.2d 145, 224 Ill.Dec. 584

END OF DOCUMENT

TAB 3

C Franzen-Peters, Inc. v. Barber-Greene Co.
Ill.App. 2 Dist.,1987.

Appellate Court of Illinois,Second District.
FRANZEN-PETERS, INC., Plaintiff-Appellant,
v.
BARBER-GREENE COMPANY, Defendant-Appellee.
No. 2-86-0926.

May 22, 1987.

Appeal was taken from order of the 18th Circuit Court, DuPage County, Anthony M. Peccarelli, J., which denied motion to reconsider dismissal of amended complaint. The Appellate Court, Reinhard, J., held that genuine issue of fact existed as to whether claim had been adequately disclosed by plaintiff in its bankruptcy proceedings and thus whether it was discharged in the proceedings or remained an asset in plaintiff's estate.

Reversed and remanded.

West Headnotes

[1] Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases
Trial court improperly considered motion to dismiss based on arguments and matters not supported by affidavit. S.H.A. ch. 110, ¶ 2-619(a).

[2] Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases
In view of apparent informal and improper presentation of motion to dismiss without affidavits and not in compliance with statute, it was abuse of discretion not to consider affidavits later filed by plaintiff in support of validity of complaint. S.H.A. ch. 110, ¶ 2-619(a).

[3] Pretrial Procedure 307A 684

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak684 k. Sufficiency and Effect. Most Cited Cases
Disputed question of fact was raised as to whether creditors had adequate information concerning debtor's lawsuit and thus whether the lawsuit was barred by debtor's discharge in bankruptcy or remained an asset in the debtor's estate. Bankr.Code, 11 U.S.C.A. § 1141(b).

[4] Bankruptcy 51 2702.1

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2702 Rights of Debtor or Injured Creditors
51k2702.1 k. In General. Most Cited Cases
(Formerly 51k2702, 51k278)
There is no requirement that debtor petition bankruptcy court for permission to pursue adequately disclosed claim against another. Bankr.Code, 11 U.S.C.A. § 1141(b).

****1115 *958 ***538** Thomas W. Fawell & Associates, Thomas W. Fawell, Anthony J. Nasharr III, Oak Brook, for plaintiff-appellant.
Murphy Hupp Foote Mielke & Kinnally, William C. Murphy, Joseph C. Loran, Aurora, for defendant-appellee.

Justice REINHARD delivered the opinion of the court:

Plaintiff, Franzen-Peters, Inc., appeals from the order of the circuit court of DuPage County which denied its motion to reconsider the dismissal of its amended complaint against defendant, Barber-Greene Company, pursuant to section 2-619(a)(6) of the Civil Practice Law (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)(6)) because the asserted causes of action had been discharged in bankruptcy.

Plaintiff raises the following issue on appeal: whether the trial court erred in determining that the amended complaint should be dismissed pursuant to section 2-619(a)(6) because the claims set forth in the amended complaint were discharged in bankruptcy.

Plaintiff filed a four-count amended complaint against defendant alleging breach of contract, breach of warranty, deceptive trade practices in violation of section 2 of the Consumer Fraud and Deceptive Business Practices Act (Ill.Rev.Stat.1985, ch. 121 1/2 , par. 262) and section 2 of the Uniform Deceptive Trade Practices Act (Ill.Rev.Stat.1985, ch. 121 1/2 , par. 312), and fraud by defendant in the 1981 sale of an asphalt plant to plaintiff. Defendant moved to dismiss the complaint pursuant to section 2-619(a) (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)). It asserted in the motion that although the contract was entered into as alleged, plaintiff filed a voluntary petition for reorganization under chapter 11 of the United States Bankruptcy Code (Bankruptcy****1116 ***539** Code) (11 U.S.C.A. § 1101*et seq.* (West 1979)). As a result of this petition, defendant contended, plaintiff lacked the legal capacity to sue because the claims embodied in the complaint were assets of the bankrupt's estate and were never listed or disclosed to creditors as an asset of plaintiff, that it would be inequitable to allow plaintiff to assert these claims because it failed to disclose these claims to its creditors, and that these claims were satisfied in plaintiff's chapter 11 bankruptcy proceeding.

***959** Additionally, defendant asserted that count III, which alleged fraudulent misrepresentation, was barred by the three-year limitation period of section 10a of the Consumer Fraud and Deceptive Business Practices Act (Ill.Rev.Stat.1985, ch. 121 1/2 , par. 270a(e)) and should be dismissed pursuant to section 2-619(a)(5) (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)(5)), and asserted that the complaint was insufficient to state a cause of action as a matter of law. (Ill.Rev.Stat.1985, ch. 110, par. 2-615(a).) No affidavits were attached to this motion. During oral arguments before the trial court, however, defendant, upon the insistence of the trial judge, chose to abandon the section 2-615 portion of the motion to dismiss and to proceed only on the issues raised in the section 2-619(a) portion of the motion. Each party filed memoranda in support of their respective positions, attaching several documents from the reorganization proceeding which included the schedule of debtor's assets and the debtor's plan of reorganization. No affidavits were filed with the memoranda either.

Following the issuance of its June 3, 1986, letter of opinion, the trial court entered an order on June 23, 1986, dismissing the complaint pursuant to section 2-619(a)(6) (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)(6)). In its letter, the trial court found that these claims were assets of the bankrupt estate, that the description of these claims in the disclosure statement, “lawsuits of unknown value,” was not “adequate information” under the Bankruptcy Code, and that it appeared that these claims were discharged in bankruptcy. Additionally, the court found that in view of this decision, it was unnecessary to consider the time limitation argument as to count III.

Plaintiff moved for reconsideration of this order. Attached to its motion were two affidavits attesting to the fact that, contrary to the trial court's conclusions, the claims were adequately disclosed within the guidelines of the Bankruptcy Code, that the claims were disclosed to and dealt with by the creditors so that upon confirmation of reorganization the claims vested with plaintiff, and that the claims were not discharged in bankruptcy. Specifically, Thomas Franzen, president of plaintiff, stated in his affidavit, in pertinent part, that creditors had ample opportunity during meetings to elicit more information concerning the contingent claims, that during the informal meetings of the creditors' committee, the contingent nature of these claims, and specifically the claim asserted herein, were discussed, that during the formal meeting with creditors, questions about claims could have been raised by creditors, and that the disclosure was adequate for the bankruptcy court and the circuit court. Also attached was an order of the bankruptcy judge approving the disclosure statement finding that ***960** it contained adequate information.

Defendant replied to the motion arguing that it should be denied because plaintiff failed to raise any new issues and that the affidavits were conclusory, self-serving, unpersuasive, and not timely filed. The trial court denied the motion in a written order without specifying any particular basis for the denial or ruling on the sufficiency of the affidavits.

The contract for sale of the asphalt plant was entered into on October 8, 1981. On October 5, 1984, plaintiff filed a petition for voluntary reorganization under chapter 11 of the Bankruptcy Code. (11 U.S.C.A. § 1101*et seq.* (West 1979)). Under the Bankruptcy Code and Bankruptcy Rules, plaintiff was required to file a schedule of assets and liabilities in the bankruptcy proceedings. (11 U.S.C.A. § 1125(a) (West 1979); Fed.R.Bankr. 1007(b), 11 U.S.C.A. R. 1007(b) (West 1984).) Plaintiff's schedule of assets included "lawsuits of unknown ****1117 ***540** value." On March 15, 1985, the bankruptcy court entered an order approving the disclosure statement and fixing time for acceptance or rejection of the reorganization plan. *In re Franzen-Peters, Inc.*, No. 84 B 12580, (Bankr.N.D.Ill. March 15, 1985). The plan was apparently confirmed in April 1985.

Plaintiff contends that the trial court incorrectly determined that the claims in the amended complaint had been discharged in bankruptcy. In particular, it argues that the claims were adequately disclosed in the context of the bankruptcy proceeding to inform creditors, and defendant, of the existence of the claims, that although these claims were part of the bankrupt's estate during the reorganization proceeding, they vested in plaintiff pursuant to section 1141(b) of the Bankruptcy Code (11 U.S.C.A. § 1141(b) (West 1979)) upon confirmation of the reorganization plan, that it is beyond the authority of the trial court to determine that the disclosure was inadequate because the bankruptcy court's determination that plaintiff's disclosure provided adequate information is conclusive on the parties, and that the claims were not adjudicated, released, satisfied, or discharged in bankruptcy, but remained an asset in plaintiff's estate.

Defendant responds that the trial court correctly dismissed the complaint pursuant to section 2-619(a). It asserts that the affidavits which plaintiff relies on to support its claim of adequate disclosure were not filed in opposition to the motion to dismiss, but in support of the motion to reconsider and should not be considered. It also asserts that, even if considered, the affidavits are self-serving and conclusory and do not comply with the Supreme Court Rules. Therefore, based solely on the information in the written disclosure statement, it argues that plaintiff's "cryptic" disclosure was insufficient to meet the ***961** Bankruptcy Code requirements for adequate disclosure of assets to allow the claims to vest in plaintiff simply because the bankruptcy court did not deal with the undisclosed assets, that to allow plaintiff to now pursue the claims would be unjust, and that plaintiff must petition the bankruptcy court for leave to now file these claims because there has been no showing that the claims were abandoned. Defendant also responds that the bankruptcy court's approval does not control the determination of this case as the asset was not "dealt with" by that court.

Plaintiff replies that disclosure does not require an exhaustive recitation of claims, but only a listing in sufficient detail as was reasonably practical, that the affidavits submitted were not contradicted and must be taken as true, that the claims here were adequately disclosed as was reasonably practical, and that abandonment of the claims is not an issue in this matter as the claims vested in plaintiff upon confirmation of the reorganization plan.

Our analysis of the issue raised by the parties concerning the propriety of the dismissal of plaintiff's complaint pursuant to section 2-619(a) is governed procedurally by the application of section 2-619(a) to the procedures followed below. Section 2-619(a) provides that "[i]f the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a); see also *Premier Electrical Construction Co. v. La Salle National Bank* (1983), 115 Ill.App.3d 638, 643, 71 Ill.Dec. 481, 450 N.E.2d 1360.) In the case at bar, the ground for dismissal does not appear on the face of the pleading. Nevertheless, contrary to the statute, no affidavit was filed by defendant in support of its motion to dismiss. Both parties, however, submitted written memoranda, without accompanying affidavits, which contained arguments based on facts asserted therein and on several documents attached to the memoranda. Pertinent hereto, the debtor's schedule of assets and the debtor's plan of reorganization in the bankruptcy

proceedings were included in these documents. Plaintiff also represented in his memoranda that during meetings of the creditors' committee the lawsuits of unknown value were "discussed" and examined.

[1] It is evident that the trial judge improperly considered this motion based on ****1118 ***541** arguments and matters not supported by affidavit. Following the dismissal of plaintiff's complaint, plaintiff filed a motion to reconsider and vacate the dismissal order and attached affidavits to the motion. The affidavit of Thomas Franzen, president of plaintiff, stated, in relevant part in paragraphs 6, 7 and 9, as follows:

"6. That I gave testimony and engaged in discussion before ***962** meetings of the creditors' committee, at which time matters relating to the claims of Franzen-Peters, Inc., against Barber-Greene, Inc., were discussed in detail. That in the course of my testimony before these meetings of the creditors' committee, the existence of claims in the nature of breach of contract, breach of warrenty [sic], fraud and misrepresentation were discussed at length, as well as the extent of damages incurred by Franzen-Peters as a direct result of the claims, and the possibility of recovery on said claims.

7. That among the reasons cited by creditors in determining not to pursue the claims of fraud, misrepresentation breach of contract and breach of warranty against Barber-Greene Company, were the costs of litigation, the possible delay in resolution of the underlying reorganization, the contingent nature of the claims and the likelihood and possibility of recovery.

9. That I was personally present in the forum of, meeting of creditors, creditors committee meetings and other proceedings in which Franzen-peters [sic], Inc.'s claims against Barber-Greene Company were discussed and commented upon by Franzen-Peters, Inc. its representatives, and various creditors."

The motion was denied without explanation.

[2][3] In the context of the apparent informal and improper way the matter was first presented below without affidavits and not in compliance with section 2-619(a), it was an abuse of discretion not to consider the affidavits later filed by plaintiff. (*Cf.* *Gelsomino v. Gorov* (1986), 149 Ill.App.3d 809, 812, 104 Ill.Dec. 1, 502 N.E.2d 264.) Considering the Franzen affidavit, it is clear that a disputed question of fact is raised as to whether the creditors had adequate information of the instant lawsuit. Additionally, we find that these statements in the Franzen affidavit are not conclusions, but state sufficient specific facts in accordance with Supreme Court Rule 191. (87 Ill.2d R. 191.) Section 2-619(c) provides that "[i]f a material and genuine disputed question of fact is raised the court * * * shall so deny it [the motion to dismiss] if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." (Ill.Rev.Stat.1985, ch. 110, par. 2-619(c); see *Castro v. Chicago, Rock Island and Pacific R.R. Co.* (1980), 83 Ill.2d 358, 361-62, 47 Ill.Dec. 360, 415 N.E.2d 365.) The record shows that plaintiff has a jury demand on file. Thus, the trial court should have denied the motion to dismiss, and the matters raised in the motion could be raised in defendant's answer and resolved at trial. Ill.Rev.Stat.1985, ch. 110, par. 2-619(d).

***963** While we recognize that the parties to this appeal have not postured their arguments in the same way as our disposition, both parties essentially dispute whether there was adequate disclosure of the claim asserted in plaintiff's complaint in the bankruptcy proceeding. This squarely presents a disputed factual question on the record before us and cannot be properly disposed of in a motion under section 2-619(a). See *Colley v. Swift & Co.* (1984), 129 Ill.App.3d 812, 818, 84 Ill.Dec. 963, 473 N.E.2d 364.

Defendant contends, however, that even assuming that these claims in plaintiff's amended complaint were properly scheduled and disclosed, the dismissal of the amended complaint is still proper because plaintiff failed to petition the bankruptcy court for an order authorizing the abandonment of these assets thereby permitting plaintiff to file these claims on its own behalf. Defendant, relying on *Dallas Cabana, Inc. v. Hyatt Corp.* (5th Cir.1971), 441 F.2d 865, argues that plaintiff, as trustee in bankruptcy on the assets under chapter****1119 ***542** 11, cannot fail to assert a cause of action which could benefit the creditors only to later maintain the action for its own benefit unless it can affirmatively demonstrate to the

bankruptcy court that it, as trustee, abandoned the cause of action.

[4] The disposition of property listed in the bankrupt's estate following the confirmation of the reorganization plan in a chapter 11 proceeding is controlled by statute. Section 1141(b) of chapter 11 of the Bankruptcy Code provides that "[e]xcept as otherwise provided in the [reorganization] plan or the order confirming the [reorganization] plan, the confirmation of a plan vests all of the property of the estate in the debtor" (11 U.S.C.A. § 1141(b) (West 1979)), and revests in the owner/debtor all the normal property rights. (See *In re Ford* (W.D.Wis.1986), 61 B.R. 913, 917; *In re Herron* (W.D.La.1986), 60 B.R. 82, 83-84.) There is no requirement in the statute that a debtor petition the bankruptcy court for permission to pursue an adequately disclosed claim.

Dallas Cabana is distinguishable as it involved a trustee's failure to assert a cause of action. Unlike the facts in this case where plaintiff alleged that it presented the claims to the creditors who decided that the nature of the claims and the likelihood of recovery were too contingent to pursue at that time and were thereby affirmatively acted upon in the reorganization proceeding by the bankruptcy court, the claims in *Dallas Cabana*, and the cases which followed its approach (see, *e.g.*, *Stein v. United Artist Corp.* (9th Cir.1982), 691 F.2d 885), did not involve property which was dealt with by the bankruptcy court during the reorganization proceeding. Therefore, it was ***964** determined that property not dealt with by the bankruptcy court could not revert automatically to the debtor as it remained before the bankruptcy court until affirmatively acted upon.

As the trial court found it unnecessary to decide whether count III was barred by the statute of limitations and as the parties have not briefed this issue, we shall not consider the merits here.

For the foregoing reasons, this cause is reversed and remanded.

Reversed and Remanded.

LINDBERG, P.J., and UNVERZAGT, J., concur.
Ill.App. 2 Dist.,1987.
Franzen-Peters, Inc. v. Barber-Greene Co.
155 Ill.App.3d 957, 508 N.E.2d 1115, 108 Ill.Dec. 538

538

END OF DOCUMENT

TAB 4

In re Marriage of Seffren
Ill.App. 1 Dist.,2006.

Appellate Court of Illinois,First District, Third Division.
In re MARRIAGE OF Colleen P. SEFFREN, n/k/a Colleen P. Foley, Petitioner-Appellee,
andRandal Seffren, Respondent-Appellee (Keane Taylor, Third-Party Respondent-Appellant).
No. 1-04-3775.

June 21, 2006.

Background: Former husband filed motion to suspend former wife's visitation, add former wife's cohabitant as third-party respondent, and permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home. The Circuit Court, Cook County, Barbara A. Riley, J., added cohabitant as third-party respondent and entered permanent injunction. Cohabitant appealed.

Holdings: The Appellate Court, Erickson, J., held that:
(1) circuit court had subject matter jurisdiction;
(2) circuit court acted within its discretion in adding cohabitant as third-party respondent;
(3) circuit court had personal jurisdiction over former wife's cohabitant;
(4) venue was proper in county in which dissolution was granted;
(5) any impropriety in venue was not basis for dismissal of action; and
(6) cohabitant was entitled to evidentiary hearing prior to issuance of permanent injunction.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Child Custody 76D 908

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk908 k. Assignment of Errors and Briefs. Most Cited Cases
Former wife's cohabitant did not waive his challenges to jurisdiction, venue, and procedural due process, in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, add cohabitant as third-party respondent, and permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home, by failing to cite to relevant authority or provide reviewing court with appropriate standard of review. U.S.C.A. Const.Amend. 14.

[2] Appeal and Error 30 169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases
Waiver is a limitation on the parties and not on a reviewing court.

[3] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Where a circuit court determines jurisdictional issues without hearing testimony, the Appellate Court reviews the court's determination de novo.

[4] Judgment 228 16

228 Judgment
228I Nature and Essentials in General
228k16 k. Jurisdiction of the Person and Subject-Matter. Most Cited Cases
In order for a judgment of a court to be valid, a court must have both jurisdiction of the subject matter of

the litigation and jurisdiction over the parties.

[5] Courts 106 1

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k1 k. Nature and Source of Judicial Authority. Most Cited Cases

Courts 106 4

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k3 Jurisdiction of Cause of Action
106k4 k. In General. Most Cited Cases
"Subject matter jurisdiction" of a court is derived from the state constitution and refers to a court's power to hear and determine cases of the general class or category to which the proceedings belong. S.H.A. Const. Art 6, § 1 et seq.

[6] Appearance 31 19(1)

31 Appearance
31k16 Jurisdiction Acquired
31k19 Of the Person
31k19(1) k. In General. Most Cited Cases

Courts 106 11

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k11 k. In General. Most Cited Cases

Process 313 48

313 Process
313II Service
313II(A) Personal Service in General
313k48 k. Nature and Necessity in General. Most Cited Cases
Personal jurisdiction is not conferred by any constitutional grant; rather, a court's jurisdiction over a person is conferred by the service of summons or by the filing of an appearance.

[7] Child Custody 76D 601

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk601 k. Jurisdiction. Most Cited Cases
Circuit court had subject matter jurisdiction over former husband's motion to have former wife's cohabitant added as third-party respondent in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home. S.H.A. 750 ILCS 5/511.

[8] Child Custody 76D 601

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk601 k. Jurisdiction. Most Cited Cases
Circuit courts have jurisdiction to modify a previously entered judgment of dissolution, so long as a modification petition has been filed. S.H.A. 750 ILCS 5/511.

[9] Child Custody 76D 605

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk605 k. Parties. Most Cited Cases
Circuit court acted within its discretion in adding former wife's cohabitant as third-party respondent in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home. S.H.A. 735 ILCS 5/2-101 et seq., 2-406; 750 ILCS 5/105(a), 403(d).

[10] Child Custody 76D 601

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk601 k. Jurisdiction. Most Cited Cases
Circuit court had personal jurisdiction over former wife's cohabitant, in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home, where record indicated that cohabitant was domiciled in Illinois and was properly served with summons, petition for a preliminary injunction, and temporary restraining order (TRO). S.H.A. 735 ILCS 5/2-209(b)(2).

[11] Child Custody 76D 602

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk602 k. Venue. Most Cited Cases
Venue in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home was proper in county in which dissolution was granted, where neither former husband nor former wife objected to such venue. S.H.A. 750 ILCS 5/512(c).

[12] Child Custody 76D 602

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk602 k. Venue. Most Cited Cases
Normal venue rules were inapplicable to require venue in county in which former wife's cohabitant resided and complained-of actions occurred, in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home, since cohabitant was added as party to preexisting dissolution proceeding venued in another county. S.H.A. 735 ILCS 5/2-101.

[13] Venue 401 15

401 Venue
401I Nature or Subject of Action
401k15 k. Ancillary and Incidental Actions and Proceedings. Most Cited Cases
Normal venue rules generally have no application where a third party has been added because the third party is added to a preexisting lawsuit.

[14] Breach of the Peace 62 20

62 Breach of the Peace
62k15 Security or Order to Keep Peace or Protect Family
62k20 k. Application and Proceedings Thereon. Most Cited Cases

Child Custody 76D 602

76D Child Custody
76DIX Modification
76DIX(C) Proceedings
76DIX(C)1 In General
76Dk602 k. Venue. Most Cited Cases
Assuming impropriety of venue in proceedings on former husband's motion to suspend former wife's visitation or parenting time under joint parenting agreement incorporated in divorce decree, to add cohabitant as third-party respondent, and to permanently enjoin cohabitant from having any contact with parties' children or residing in former wife's home, such impropriety was not basis for dismissal of action.

[15] Injunction 212 1

212 Injunction
212I Nature and Grounds in General

212I(A) Nature and Form of Remedy
212k1 k. Nature and Purpose in General. Most Cited Cases

Injunction 212 132

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)1 In General
212k132 k. Nature and Scope of Provisional Remedy. Most Cited Cases
While the purpose of a preliminary injunction is to preserve the status quo pending resolution of the merits of the case, the purpose of a permanent injunction is to maintain the status quo indefinitely following a hearing on the merits.

[16] Injunction 212 9

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k9 k. Nature and Existence of Right Requiring Protection. Most Cited Cases
In order to be entitled to a permanent injunction, the party seeking the injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law.

[17] Breach of the Peace 62 20

62 Breach of the Peace
62k15 Security or Order to Keep Peace or Protect Family
62k20 k. Application and Proceedings Thereon. Most Cited Cases
Former wife's cohabitant was entitled to evidentiary hearing prior to issuance of injunction permanently enjoining him from having any contact with former wife's children or residing in former wife's home.

[18] Injunction 212 130

212 Injunction
212III Actions for Injunctions
212k130 k. Trial or Hearing. Most Cited Cases
Permanent injunction may be entered only after the party seeking the injunction demonstrates at a hearing on the merits the requisite elements for permanent injunctive relief.

[19] Injunction 212 115

212 Injunction
212III Actions for Injunctions
212k115 k. Process and Appearance. Most Cited Cases

Witnesses 410 266

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k266 k. Right to Cross-Examine and Re-Examine in General. Most Cited Cases
Permanent injunction may not be entered without providing the respondent the opportunity to appear in court, to present evidence, and to cross-examine witnesses where he or she is not in default.

****305** Richard H. Marcus, Glenview, for Appellant.
Deutsch, Levy & Engle, Chtd., Chicago, (Stuart Berks and Leon Farbman, of counsel), for Randal Seffren.
Helen Sigman & Associates, Ltd., Chicago (Natalie M. Stec, of counsel), for Seffren Minor children.

Justice ERICKSON delivered the opinion of the court:
***629 ***55** The marriage between petitioner Colleen Seffren, now known as Colleen Foley, and respondent Randal Seffren was dissolved in 1997. Respondent thereafter filed several postdecree motions in which he sought to suspend petitioner's visits with the parties' children, to add petitioner's live-in boyfriend, Keane Taylor, as a third-party respondent, and to enjoin Taylor from having any contact with the parties' children or from residing in petitioner's home. The circuit court granted respondent's motion to add Taylor as a third party and entered a permanent injunction. On appeal, Taylor argues: (1) the circuit court lacked jurisdiction to add him as a third-party respondent; (2) Cook County was not the proper venue; (3) the circuit court lacked authority to enter a permanent injunction without

holding an evidentiary hearing; and (4) the circuit court erred in denying his motion to reconsider.

***630** BACKGROUND

On December 29, 1997, the circuit court of Cook County entered a judgment dissolving the marriage between petitioner and respondent. Incorporated into that judgment was a joint parenting agreement establishing that the parties' two children, a daughter born in 1991 and a son born in 1993, would reside with each parent on alternating weeks (the alternating weekly parenting schedule).

Petitioner began dating Taylor around the time of dissolution, and at some point, Taylor moved into petitioner's home located in Deerfield, Lake County. Taylor and petitioner are not married and it is not disputed that Taylor has no interest in petitioner's home.

On May 25, 2004, respondent filed in the circuit court of Cook County an emergency petition to suspend petitioner's visitation or parenting time, alleging that visitation with petitioner while she resided with Taylor seriously endangered the physical, mental, moral or emotional health of the children and that the children were afraid of Taylor. Respondent alleged petitioner had represented that Taylor would be moving out of her home. He also alleged that Taylor had gained access to petitioner's house by breaking a window when the daughter was present after petitioner had *****56 **306** tried to keep him out. Attached to the petition were reports from the children's psychiatrist, Dr. Levin, outlining the negative effects, including depression and anxiety, the children experienced due to Taylor's presence in petitioner's home. Dr. Levin also reported that the daughter desired to injure herself and had suicidal thoughts. He recommended that any contact between the children and Taylor discontinue immediately. The petition was also supported by respondent's affidavit.

On that same date, the circuit court entered an order terminating the alternating weekly parenting schedule and ordering that the children reside with respondent until such time as Taylor has permanently vacated petitioner's home and that petitioner take all action to ensure that Taylor have no contact with the children. The court allowed petitioner reasonable visitation away from Taylor and her home and continued the matter to May 28, 2004.

On May 28, 2004, the court entered an order substantially similar to the one entered on May 25 after petitioner failed to appear in court and set the matter for a status hearing on June 29.

On June 23, 2004, respondent filed a motion to add Taylor as a third-party respondent.[FN1] Respondent alleged that petitioner "flagrantly disregarded" the court's previous orders on several occasions and ***631** stated "[i]t is imperative that this court have jurisdiction over [Taylor] in order to enjoin him from various destructive and dangerous activities." Notice of that motion was sent to petitioner and the matter was set for June 29. On that date, Cook County Circuit Court Judge Barbara Riley entered an order adding Taylor as a third-party respondent and ordering that the alternating weekly parenting schedule cease. Petitioner was allowed reasonable visitation.

> FN1. Respondent had filed a motion to add Taylor to the initial dissolution proceedings. That motion, however, was stricken upon petitioner's motion.

Respondent, on July 7, 2004, filed a petition pursuant to sections 11-101 and 11-102 of the Code of Civil Procedure (735 ILCS 5/11-101, 11-102 (West 2004)) and section 501 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/501 (West 2004)) seeking injunctive relief against Taylor. Respondent alleged facts similar to those previously stated and added that Taylor had threatened respondent and, despite the court's previous orders, continued to be present at petitioner's home. Respondent sought a temporary restraining order (TRO) without notice or bond and a preliminary injunction enjoining and restraining Taylor from all contact with the children, from residing at petitioner's home, from having a key to petitioner's home, and from having any contact with respondent or his wife. Cook County Circuit Court Judge Melvin Cole entered the TRO, which was set to expire on July 14, the date of the hearing on the preliminary injunction.

Taylor was served with summons, the petition for an injunction, and the TRO on July 8, 2004, at an apartment building in Highland Park. Counsel for

Taylor then entered a special and limited appearance on July 13. On July 14, the parties entered an agreed order continuing the TRO and the hearing on the preliminary injunction until July 16. In that order, Taylor's attorney indicated he was unavailable to appear in court and was seeking a continuance "without waiving objection to venue and jurisdiction." The following day, Taylor's attorney filed a "Motion to Dismiss Keane Taylor as a Third Party for Lack of Jurisdiction." Taylor argued in that motion that "the court did not have jurisdiction*****57 **307** over him" because he was a resident of Highland Park in Lake County and because the actions complained of in respondent's petition for injunctive relief occurred in Lake County. He also argued that he was not subject to the Act because he was not party to the Seffrens' original dissolution action. The only statutory provision Taylor relied on in the motion was the general venue provision of the Code of Civil Procedure (735 ILCS 5/2-101 (West 2004)). That motion was noticed for July 16.

In the meantime, on July 9, 2004, Cook County Circuit Court Judge Raymond Figueroa entered an agreed order resuming the alternating weekly parenting schedule. The order also stated that ***632** petitioner "shall take all action, including all legal remedies necessary to ensure that [Taylor] has no contact with the minor children * * * including face-to-face interaction at home or away from home, phone calls, phone messages, letters, emails [*sic*] messages and the like," and that if Taylor had contact with the children, whether or not invited by petitioner, the alternating weekly parenting schedule would cease and the children would reside with respondent until such time as it could be assured that the children would have no contact with Taylor. A copy of that order was sent to petitioner and Taylor.

When the parties appeared in court on July 16, 2004, the TRO entered on July 7 was set to expire. However, because there had not yet been a hearing on respondent's petition for an injunction, Judge Figueroa entered an order *sua sponte*, and over the objection of Taylor's attorney, stating that it was in the best interest of the children that they have no contact with Taylor and ordering Taylor to stay 100 yards away from them at all times. The order also set Taylor's motion to dismiss for hearing on August 25 and "entered and continued" respondent's petition for an injunction to that date for status.

On July 30, 2004, respondent filed a second petition to suspend petitioner's visitation or parenting time, alleging that on July 26 or 27, Taylor had been at petitioner's home and had erased incoming and outgoing messages from the daughter's private answering machine, and that despite her intentions to the contrary, petitioner had no ability to ensure compliance with the court's orders prohibiting contact. Notice of the petition was sent to counsel for petitioner and Taylor and the matter was set for August 11.

On August 11, 2004, the parties appeared before Judge Riley and entered an agreed order continuing respondent's second petition to suspend visitation for "status/hearing" until August 25, the date the court would hear Taylor's motion to dismiss. Also set for August 25 was a subsequent petition respondent had filed for a rule to show cause [FN2] and, as indicated above, respondent's petition for injunctive relief. The court additionally entered an order appointing Helen Sigman as the children's representative.

> FN2. Only a notice of motion for the rule to show cause is contained in the record on appeal. However, the record indicates the petition was in response to Taylor's violation of the court's order that he stay 100 yards away from the children.

On August 25, 2004, the parties' attorneys and Sigman appeared before Judge Riley and presented arguments concerning: (1) Taylor's motion to dismiss; (2) respondent's petition for an injunction; (3) respondent's petition for a rule to show cause; and (4) respondent's ***633** second petition to suspend visitation. In regard to the motion to dismiss, Taylor's attorney argued that the Act did not provide the *****58 **308** court with a mechanism to add third-party respondents and that, because Taylor was not party to the original dissolution proceeding, the court lacked jurisdiction over him. Counsel also argued the cause should be dismissed for lack of venue.

Sigman indicated that after speaking to both parents and the children, and after reading the reports prepared by the children's psychiatrist and exchanging phone messages with him, it was her conclusion that both petitioner and respondent cared

for the children, that both parents, and the children, enjoyed the alternating weekly parenting schedule, and that the only issue was petitioner's inability to keep Taylor away from the children. Sigman wanted the July 9, 2004 order in which petitioner agreed to keep Taylor away from the children expanded to enjoin Taylor from being in petitioner's home at any time, including when the children did not live there.

Petitioner's attorney represented that Taylor had moved out of petitioner's home in June and argued that the July 9 order was sufficient to protect the interests of the children. Counsel also argued that it was unnecessary to enjoin Taylor from residing in petitioner's home when the children were not staying there. However, if an injunction needed to be entered, counsel's position was that it should issue only against Taylor.

Taylor's attorney objected, arguing that Taylor should be given an opportunity to respond in writing and appear before the court before an injunction was entered. The court responded by saying "[t]hese are not his children, nor is this is [*sic*] his home." When counsel again argued that Taylor was entitled to appear in court or respond in writing, and was entitled to a hearing, the court responded "[b]ut, [c]ounsel, a hearing on what? They are not his children. It is not his home." The court added "[w]hat could he possibly say in regard to his ability to have contact with somebody else's children [?] * * * It's not like he's being accused of wrongdoing."

The circuit court determined that jurisdiction was proper and denied Taylor's motion to dismiss. The court also found that a permanent, rather than temporary, injunction was necessary because the problem was ongoing. The court then entered a permanent injunction prohibiting Taylor from having "any contact whatsoever" with the Seffren children or petitioner's home and ordering him to remain at least 100 yards away from the children at all times. The order also prohibited petitioner from allowing Taylor contact with the children or access to her home. Respondent's second motion to suspend visitation and his petition for a rule to show cause were withdrawn, and the ***634** matter was ordered " off-call." The court subsequently denied Taylor's motion to reconsider and made a finding that there was no just reason to delay enforcement of its orders. Taylor now appeals.

ANALYSIS

[1][2] Taylor raises issues of jurisdiction, venue, and procedural due process on appeal. As respondent points out, Taylor has failed to support the majority of his contentions with citation to relevant authority in violation of Supreme Court Rule 341(e)(7) (Official Reports Advance Sheet No. 21 (October 17, 2001), R. 341(e)(7), eff. October 1, 2001). Taylor has also failed to provide this court with the applicable standard of review as required by section (e)(6) of that rule. Respondent requests that we find Taylor has waived his contentions for appeal. This court "is not a depository in which the appellant may drop the burden of argument and research" and is entitled to have the arguments of the parties clearly set forth and supported by pertinent authority. *****59**309***In re Marriage of Winton*, 216 Ill.App.3d 1084, 1090, 159 Ill.Dec. 933, 576 N.E.2d 856 (1991); *Johnson v. Matrix Financial Services Corp.*, 354 Ill.App.3d 684, 698, 290 Ill.Dec. 27, 820 N.E.2d 1094 (2004). However, as waiver is a limitation on the parties and not on this court, we will not find Taylor's contentions waived. *In re Marriage of Kostusik*, 361 Ill.App.3d 103, 114, 296 Ill.Dec. 732, 836 N.E.2d 147 (2005).

I

[3] Taylor challenges the circuit court's determination that it had jurisdiction. Where a circuit court determines jurisdictional issues without hearing testimony, we review the court's determination *de novo*. *In re Marriage of Kosmond*, 357 Ill.App.3d 972, 974, 294 Ill.Dec. 184, 830 N.E.2d 596 (2005)(*Kosmond*).

Taylor's jurisdictional challenge, as set out before the circuit court and before this court, is unclear. Although he claims to contest the circuit court's subject matter jurisdiction to add him as a third-party respondent, Taylor uses phrases such as "over him," which sound in personal jurisdiction. The procedures used by trial counsel, including filing a special appearance to contest jurisdiction, also indicate a challenge to personal jurisdiction, at least under the preamended version of section 2-301 of the Code of Civil Procedure (see 735 ILCS 5/2-301 (West 1998); *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill.App.3d 593, 594-97, 301 Ill.Dec. 418, 846 N.E.2d 1021

(2006) (discussing the 2000 amendments to section 2-301)). We will therefore address the circuit court's subject matter and personal jurisdiction.

[4][5][6] In order for a judgment of a court to be valid, a court must have both jurisdiction of the subject matter of the litigation and jurisdiction over the parties. ***635***In re Marriage of Verdung*, 126 Ill.2d 542, 547, 129 Ill.Dec. 53, 535 N.E.2d 818 (1989); *State Bank of Lake Zurich v. Thill*, 113 Ill.2d 294, 308, 100 Ill.Dec. 794, 497 N.E.2d 1156 (1986). Subject matter jurisdiction is derived from Article VI of the Illinois Constitution (Ill. Const.1970, art. VI) and refers to a court's power to hear and determine cases of the general class or category to which the proceedings belong. *In re Marriage of Devick*, 315 Ill.App.3d 908, 913, 248 Ill.Dec. 833, 735 N.E.2d 153 (2000)(*Devick*); *In re Marriage of Hostetler*, 124 Ill.App.3d 31, 34, 79 Ill.Dec. 401, 463 N.E.2d 955 (1984)(*Hostetler*). Personal jurisdiction, on the other hand, is not conferred by any constitutional grant; rather, a court's jurisdiction over a person is conferred by the service of summons or by the filing of an appearance. *Hostetler*, 124 Ill.App.3d at 34, 79 Ill.Dec. 401, 463 N.E.2d 955; see also *In re Marriage of Schmitt*, 321 Ill.App.3d 360, 367, 254 Ill.Dec. 484, 747 N.E.2d 524 (2001).

[7][8] In this case, the circuit court had subject matter jurisdiction. Section 511 of the Act (750 ILCS 5/511 (West 2004)) grants the circuit courts jurisdiction to modify a previously entered judgment of dissolution, so long as a modification petition has been filed. *Ottwell v. Ottwell*, 167 Ill.App.3d 901, 908, 118 Ill.Dec. 873, 522 N.E.2d 328 (1988). Here, respondent filed a petition to suspend petitioner's visits until such time as she could ensure the children would not be exposed to Taylor. Therefore, the circuit court had jurisdiction over the subject of respondent's postdecree motions.

[9] Further, contrary to Taylor's contention, he was properly added as a third-party respondent. Section 403 of the Act provides that the circuit court may join additional parties in its discretion. 750 ILCS 5/403(d) (West 2004). Even though the joinder of third parties is not specifically addressed in the postdecree context, *****60 **310** section 105 of the Act states that the Civil Practice Law (735 ILCS 5/2-101*et seq.* (West 2004)) shall apply except where otherwise provided. 750 ILCS 5/105(a) (West 2004). Section 2-406 of the Civil Practice Law provides a way for individuals to be brought into cases as third parties. 735 ILCS 5/2-406 (West 2004). Following this statutory scheme, it seems that a circuit court may add third parties in dissolution cases, and cases from this court in fact support such a notion. See *Kosmond*, 357 Ill.App.3d at 973, 294 Ill.Dec. 184, 830 N.E.2d 596 (German bank added as a third-party respondent in a dissolution proceeding); *Devick*, 315 Ill.App.3d at 913, 248 Ill.Dec. 833, 735 N.E.2d 153 (addressing a third-party action in the postdecree context); *In re Marriage of Olbrecht*, 232 Ill.App.3d 358, 365-66, 173 Ill.Dec. 661, 597 N.E.2d 635 (1992) (discussing counsels' strategic choices to opt to not add the husband's aunt as a party in a dissolution proceeding). Taylor even concedes that in some cases, courts may add certain parties as third-party respondents, but, for unspecified reasons, argues he could not be added in this case. We will not entertain such a vague and unsupported argument and therefore conclude that the circuit court had the authority to add ***636** Taylor to the postdecree proceedings at bar, and otherwise had jurisdiction over the subject matter of the proceedings.

[10] We similarly conclude that the circuit court had personal jurisdiction over Taylor. Section 2-209(b)(2) of the Code of Civil Procedure provides that a court may exercise jurisdiction over a natural person domiciled within the state at the time the action arose. 735 ILCS 5/2-209(b)(2) (West 2004); *Kosmond*, 357 Ill.App.3d at 976, 294 Ill.Dec. 184, 830 N.E.2d 596. The record in this case indicates that Taylor, a resident of Lake County, was domiciled in Illinois and was properly served with summons, the petition for a preliminary injunction, and the TRO on July 8, 2004. Personal jurisdiction was therefore proper.

II

[11] Taylor next contends that the circuit court "erred in denying [his] motion to dismiss" because Cook County was not the proper venue. This contention also lacks merit.

Section 512 of the Act addresses venue in the postdecree context. 750 ILCS 5/512 (West 2004). According to that section, where, as here, both the respondent and the petitioner no longer live in the judicial circuit where the dissolution was granted,

further proceedings may continue in that circuit. 750 ILCS 5/512(c) (West 2004). Therefore, as the parties' marriage was dissolved in Cook County, venue remained in that county so long as neither party objected. The record indicates that neither petitioner nor respondent objected to the proceedings taking place in Cook County, and venue was therefore proper.

[12][13] Taylor argues that although Cook County may have been the proper venue to litigate any issues between petitioner and respondent, Lake County was the only venue to litigate respondent's motions for injunctive relief against Taylor. Taylor seems to argue that because section 512 addresses venue only as it involves the petitioner or the respondent, and not as it relates to third parties added post decree, the general venue provision of the Code of Civil Procedure applies. Relying on section 2-101 of that Code, Taylor argues venue was proper in Lake County because that is where he resides and where the complained-of actions arose. See 735 ILCS 5/2-101 (West 2004). Taylor's contention fails, as normal venue rules generally have no application where a third party has been added because the third party is added to a preexisting lawsuit. 3 R. ***61 **311 Michael, Illinois Practice § 25.5, at 444 (1989).

[14] Even if we were to accept Taylor's contention that Cook County was an improper venue, the result would not be to dismiss the case. Rather, the proper relief would be to transfer the cause to Lake County. At no point during the proceedings did Taylor ever ask that the case ***637** be transferred to Lake County; rather he sought only to dismiss the action in its entirety. As neither the Act nor the Code of Civil Procedure provides for such relief, the circuit court did not err in denying Taylor's motion to dismiss the case.

III

Taylor next contends that the circuit court erred in entering a permanent injunction on August 25, 2004, because the matter was only set for status on that date and because the court did not provide him with an opportunity to respond or to present evidence.

[15][16] While the purpose of a preliminary injunction is to preserve the status quo pending resolution of the merits of the case (*Butler v. USA Volleyball*, 285 Ill.App.3d 578, 582, 220 Ill.Dec. 642, 673 N.E.2d 1063 (1996)(*Butler*)), the purpose of a permanent injunction is to maintain the status quo indefinitely following a hearing on the merits (*American National Bank & Trust Co. of Chicago v. Carroll*, 122 Ill.App.3d 868, 881, 78 Ill.Dec. 467, 462 N.E.2d 586 (1984)(*Carroll*)). In order to be entitled to a permanent injunction, the party seeking the injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law. *Sparks v. Gray*, 334 Ill.App.3d 390, 395, 268 Ill.Dec. 103, 777 N.E.2d 1026 (2002)(*Sparks*). Because the issues raised in this case present questions of law, our review of the grant of injunctive relief is *de novo*. *Butler*, 285 Ill.App.3d at 582, 220 Ill.Dec. 642, 673 N.E.2d 1063.

[17][18][19] We agree with Taylor's contention that the circuit court erred in issuing an injunction permanently enjoining him from having any contact with the Seffren children or from residing in petitioner's home without holding an evidentiary hearing on the matter. It is settled law that a permanent injunction may be entered only after the party seeking the injunction demonstrates at "a hearing on the merits" the requisite elements for permanent injunctive relief. *Carroll*, 122 Ill.App.3d at 881, 78 Ill.Dec. 467, 462 N.E.2d 586; *Sparks*, 334 Ill.App.3d at 395, 268 Ill.Dec. 103, 777 N.E.2d 1026; *Butler*, 285 Ill.App.3d at 582, 220 Ill.Dec. 642, 673 N.E.2d 1063. Further, a permanent injunction may not be entered without providing the respondent the opportunity to appear in court, to present evidence, and to cross-examine witnesses where he or she is not in default. *Pfeffer v. Lebanon Land Development Corp.*, 46 Ill.App.3d 186, 193-94, 4 Ill.Dec. 740, 360 N.E.2d 1115 (1977); *James B. Beam Distilling Co. v. Foremost Sales Promotions, Inc.*, 13 Ill.App.3d 176, 178, 300 N.E.2d 488 (1973).

The report of the August 25, 2004 proceedings indicates that the circuit court considered only arguments from the parties' attorneys and the children's representative. Taylor was not present, and although Taylor's attorney objected several times and asked that ***638** Taylor be permitted to be heard and to present evidence, Taylor was not given an opportunity to respond to the allegations contained in respondent's petition or to present evidence. The

circuit court then entered a permanent injunction without hearing any testimony or other substantive evidence. Because*****62 **312** the procedures undertaken by the circuit court in this case were improper, we reverse the circuit court's order granting a permanent injunction, and remand the cause for further proceedings not inconsistent with this opinion. In light of our findings, we need not consider Taylor's contention regarding the denial of his motion to reconsider.

CONCLUSION

The portions of the circuit court's August 25, 2004 order finding jurisdiction and venue proper are affirmed. The circuit court's order granting a permanent injunction is reversed and the cause is remanded.

Affirmed in part and reversed in part; cause remanded.

HOFFMAN, P.J., and KARNEZIS, J., concur.
Ill.App. 1 Dist.,2006.
In re Marriage of Seffren
366 Ill.App.3d 628, 852 N.E.2d 302, 304 Ill.Dec. 52

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TAB 5

LCOR Inc. v. Murray
N.D.Ill.,1997.
Only the Westlaw citation is currently available.
United States District Court,N.D. Illinois,Eastern Division.
LCOR INCORPORATED, Plaintiff,
v.
Michael S. MURRAY, Oliver Hoffmann Corporation, Michigan Avenue Partners, Inc., and Churchill Properties, L.L.C., Defendants.
No. 97 C 1302.

March 20, 1997.

MEMORANDUM OPINION AND ORDER

PALLMEYER, United States Magistrate Judge.
***1** LCOR Incorporated, a Pennsylvania corporation, seeks a preliminary injunction to prohibit its former employee, Michael S. Murray, from competing with LCOR for the purchase of a piece of property in Will County, Illinois, that is owned by Defendant Oliver Hoffmann Corporation and is referred to by the parties as "River Run." This court concludes that LCOR has shown a strong likelihood that it will succeed on the merits of its claims that Murray breached his fiduciary duties to LCOR by attempting to usurp a corporate opportunity. LCOR has demonstrated, further, that it will suffer irreparable harm in the absence of immediate injunctive relief. Accordingly, the court grants LCOR's motion and preliminarily enjoins Murray and others acting in concert with him from further negotiation for or purchase of the River Run property.[FN1]

FN1. Defendant Oliver Hoffmann's motion to dismiss the request for preliminary injunction as against it was granted by this court on March 17, 1997, without objection from Plaintiff.

FINDINGS OF FACT

1. Plaintiff LCOR Inc. is a Pennsylvania corporation which has its principal place of business in Berwyn, Pennsylvania. LCOR is engaged in the business of real estate development. At all relevant times, LCOR maintained a small office in Chicago for purposes of conducting its business in Illinois. Ed Polich, a Vice President of LCOR, is assigned to supervise the Chicago office. In October 1993, Mr. Polich hired Michael Murray to conduct LCOR's business of acquiring and developing parcels of real estate in the Chicago area.

2. Defendant Oliver Hoffmann Corporation and its principals, Paul and Camille Hoffmann, own several parcels of property in and near Naperville, Illinois, a suburb west of Chicago. Beginning in 1994, LCOR began negotiations with Hoffmann for purchase of property referred to as "Prairie Lakes," a 19.09-acre tract of land in Naperville. Michael Murray conducted these negotiations on behalf of LCOR. On May 5, 1995, LCOR submitted a Letter of Intent to Robert W. Schulz, an officer of Oliver Hoffmann, for purchase of Prairie Lakes. Schulz signed the Letter of Intent and, after several months of further negotiations, the parties entered into a formal purchase agreement on September 7, 1995.

3. The sale of the Prairie Lakes property closed on August 30, 1996. In recognition of his services on the Prairie Lakes purchase, LCOR paid Murray a $35,000 bonus on September 6, 1996. On October 16, 1996, LCOR's Executive Committee issued a memorandum announcing that Mike Murray "will be signing employment and incentive compensation agreements" and that he "will hereinafter be attending all Corporate meetings in the capacity of an LCOR Vice President." Murray in fact refused to sign his employment agreement because he objected to various terms, including non-competition obligations. Murray believes his appointment as Vice President is ineffective because it was conditioned on his agreement to the employment contract.

4. During the spring of 1995, LCOR became interested in purchasing another tract of land from Oliver Hoffmann. This second parcel, known as "River Run," [FN2] covers 13.7 acres in Will County, Illinois, and lies partly within a flood plain. Michael Murray was assigned the task of negotiating with Oliver Hoffmann for the purchase of River Run and supervising the project development for the property.

FN2. "River Run" is the name of a much larger piece of property, parts of which have been developed. For purposes of this decision, the court uses the term "River Run" in reference to the 13.7 acre parcel at issue here.

***2** 5. On October 24, 1995, LCOR executed and delivered to Oliver Hoffmann a Letter of Intent to purchase River Run on the terms and conditions set forth in that letter, including a proposed purchase price and certain contingencies which were very similar to those involved in the Prairie Lakes purchase. On November 14, 1995, Oliver Hoffmann responded to the Letter of Intent with a counterproposal, explaining that Oliver Hoffmann was agreeable to the proposal with certain modifications, including an increase in the price. On November 22, 1995, Ed Polich of LCOR signed the counterproposal, indicating LCOR's acceptance of the modified terms, and faxed it to LCOR. The agreement reflected in the two letters established a purchase price of $1,712,500.00, subject to adjustments based upon the number of multi-family rental units that were ultimately placed on the property; a provision for a 120-day period for engineering, soil, environmental, and other studies; and a commitment to negotiate a definitive purchase agreement.

6. Beginning in December 1995, LCOR began preparation of a purchase agreement for the River Run parcel. On January 8, 1996, Michael Murray transmitted LCOR's draft purchase agreement to Bob Schulz of Oliver Hoffmann. The draft purchase agreement, which was drafted by LCOR's Washington, D.C. attorney, was similar in form to the agreement used for the Prairie Lakes purchase.

7. In January and February 1996, Oliver Hoffmann and its outside counsel communicated with Murray concerning the draft purchase agreement. Murray communicated directly with LCOR's counsel concerning Oliver Hoffmann's comments and proposed changes to the draft purchase agreement. LCOR's attorney transmitted a revised draft of the agreement to Murray in February 1996 for submission to Oliver Hoffmann, and sent Murray two additional drafts in March and April of that year.[FN3] Contrary to LCOR's expectations, and contrary to Murray's representations to Polich that he was working on the River Run transaction, Murray never sent any of these drafts of the agreement to Oliver Hoffmann.

FN3. Murray contends he was instructed not to send these drafts to Oliver Hoffmann until the parties had resolved issues relating to the flood plain. The cover letter from LCOR's attorney transmitting the February 1996 draft does suggest that the draft be delivered "when the [flood plain] investigation is complete." His April cover letter, however, specifically contemplates prompt review of that draft by the seller and its attorney.

8. Beginning in April 1996, LCOR and Oliver Hoffmann made efforts to resolve issues relating to the flood plain on the River Run property with governmental officials. LCOR retained its own engineers and worked with them and with engineers for Oliver Hoffmann and for the City of Naperville and the Naperville Park District to find an appropriate solution to the problems created by the flood plain. The parties' efforts continued for several months. In November 1996, Murray advised Ed Polich that the flood plain problem was resolved and that the River Run deal could proceed.

9. In a memorandum dated November 4, 1996, Murray requested approval from LCOR's Executive Committee of a $36,000 budget for expenses in connection with River Run, including costs for market research, architectural plans, environmental and engineering studies, and legal costs. Murray's memo noted that Oliver Hoffmann had "honored their word and kept the [River Run property] off the market for LCOR." [FN4]He concluded that once the flood plain issue was resolved, "we will execute the purchase contract." In a November 11, 1996 memo, Ed Polich approved the market research and engineering expenditures, but directed Murray to hold off and remaining expenses "until we have a firm read with respect to the site engineering issues."

FN4. Oliver Hoffmann's real estate broker, Mike Phillips, confirmed in his deposition testimony that "the Hoffmanns only deal with one buyer. First buyer is the one they work with. If that doesn't work out, they will go to the second. But they don't encourage

multiple offers, that's not their style."

***3** 10. On December 3, 1996, Murray met with LCOR officials and assured them that a definitive purchase agreement for the River Run parcel would be prepared and executed within seven to ten days. In a memorandum dated December 6, 1996, Eric Eichler, the President of LCOR, directed Murray to prepare estimates for engineering expenses for the flood plain remediation and construction estimates.

11. Later that month, Murray met with a long-time friend and real estate financier, Michael Lynch. Lynch is a principal of Defendant Michigan Avenue Partners and of Defendant Churchill Properties, L.L.C., a limited liability company formed in February 1997. Lynch and Murray discussed Murray's dissatisfaction with his employment with LCOR. Murray and Lynch agreed conceptually to terms upon which Murray would leave LCOR and work for one of the businesses controlled by Lynch. To that end, Lynch instructed Murray to "tie up loose ends" with LCOR.

12. On or about December 13, 1996, LCOR's counsel sent Murray yet another revised draft of the purchase agreement for submission to Oliver Hoffmann. Again, contrary to his responsibility to LCOR, Murray failed to transmit the December 1996 purchase agreement. Instead, although he knew that he had withheld the draft agreements, Murray assured Polich and others at LCOR that he was working on obtaining an executed agreement, that he would obtain a fully executed agreement within a week to ten days, and that the contract was being delayed for reasons independent of him, including the fact that the Hoffmanns were in Florida.

13. In late December 1996, Murray contacted Michael Phillips, a real estate broker who represents the Oliver Hoffmann Corporation and its principals, and asked him to set up a meeting with Bob Schulz. Murray met with Phillips and Schulz on or about January 6. At that meeting, Phillips and Murray discussed the River Run property and Phillips' perception that LCOR did not want to proceed with the deal. Murray asked Phillips whether Oliver Hoffmann would be willing to sell the property to Murray himself, if the deal with LCOR did not take place. Murray went on to tell Phillips and Schulz that LCOR had instructed him to deceive Oliver Hoffmann and lie to them regarding the reasons for the delay in proceeding with the River Run deal. At the hearing, Murray explained that a buyer is always advantaged by delay in the execution of a purchase agreement. He acknowledged that all parties to the proposed transaction were aware of this. Other than LCOR's business interest in delaying execution of a purchase agreement, Murray was unable to explain what "lies" or "deceit" were involved in LCOR's negotiations with Oliver Hoffmann.

14. Phillips expressed concern about Murray's capacity to finance a purchase of the River Run property. Accordingly, on January 6, Murray contacted Michael Lynch, the President of Michigan Avenue Partners, Inc. At Murray's request, Lynch prepared a letter to Paul Hoffmann of the Oliver Hoffmann Corporation in which he explained that Michigan Avenue Partners would provide $2,300,000.00 for the purchase of the River Run property by Churchill Properties, L.L.C., a newly-formed limited liability company with Michael Lynch serving as president.

***4** 15. Murray again discussed the terms of his offer to purchase the River Run property with Michael Phillips on January 17, 1997. Also on January 17, Murray and Lynch together telephoned Wesley Becker, an attorney who represents Lynch. Soon after this conversation, Murray and Lynch provided Becker with the December 1996 draft of LCOR's proposal for purchase of River Run, and asked Becker to use that draft as a basis for preparing their own proposal for purchase of the property.

16. On January 29, 1997, Ed Polich transmitted to Eric Eichler a detailed estimate of the construction costs for multi-family housing at River Run that would be of a type and nature similar to a project known as Kingscrest that had been developed by LCOR several years earlier in Washington, D.C. Although Murray's name is included as the second author of this memorandum, he testified (without explanation for his reasons) that he refused to sign it.

17. On the afternoon of February 6, 1997, Michael Murray tendered his resignation from LCOR to Ed Polich. Murray explained that he believed he could make more money developing property on his own than he could as an employee of LCOR. Polich told Murray that he should not attempt to pursue the River

Run property because that was LCOR's project.

18. Concerned by Murray's decision to resign without notice, Polich cleaned out Murray's office on the evening of February 6, 1997. Off to one side of Murray's desk, Polich found materials relating to the River Run transaction, including the draft purchase agreements that LCOR's counsel had sent Murray in February, March, April, and December 1996, together with the attorney's original cover letters. Polich telephoned Bob Schulz of Oliver Hoffmann to express LCOR's continued interest in the River Run proposal and Polich's hope that the parties could reach a final agreement. The following day, on February 7, 1997, Polich submitted LCOR's proposed agreement to Bob Schulz.

19. Also on February 7, 1997, at 10:00 a.m., Mike Murray presented Bob Schulz with an offer to purchase River Run. Murray's offer was made on behalf of Defendant Churchill Properties, L.L.C. and was executed by Churchill's president, Michael Lynch. The Churchill offer was virtually identical in form to the draft agreements that LCOR's attorney had sent Murray for submission to Oliver Hoffmann. In fact, at the preliminary injunction hearing, Churchill's attorney, Wesley Becker, testified that he prepared the Churchill proposal using a draft that Murray or Lynch had provided him on or about January 17. The draft Mr. Becker worked from bears a code near the bottom of the page that identifies it as having been produced on LCOR's attorneys' word-processing system. Bob Schulz and Mike Phillips together compared the two documents and noted the substantive similarities.[FN5] Several days later, Curt Cobine, Oliver Hoffmann's counsel, told Murray he thought it in "bad form" to copy LCOR's proposed agreement in this way.

> FN5. Defendants urge that the portions of LCOR's draft purchase agreement that were copied by Attorney Becker are mere "boilerplate." The court notes, however, that even boilerplate provisions in a real estate purchase agreement may be arranged and ordered in a variety of ways. Having reviewed both draft agreements, the court concludes, as did Mr. Schulz and Mr. Phillips, that the two proposed bids are nearly identical, including the same misspelling of the name Oliver Hoffmann.

***5** 20. Bob Schulz asked Churchill to indemnify Oliver Hoffmann against any claims LCOR might assert regarding River Run. Schulz testified at the hearing that he sought this indemnification not because he believes LCOR has contractual rights to purchase River Run, but because he is concerned that LCOR might have claims against Michael Murray. On February 10, 1997, Michael Lynch did transmit to Schulz a signed "Indemnification Agreement" under which Churchill agreed to indemnify Oliver Hoffmann for claims asserted by LCOR regarding River Run.[FN6]On February 11, 1997, Lynch filed articles of Incorporation for Churchill Properties, L.L.C.

> FN6. Lynch testified that Phillips prepared the draft Indemnification Agreement, and that it was Phillips who provided Wes Becker with a form purchase agreement. He also testified to several different dates on which he first became aware of the River Run proposal, claiming at one point in his testimony that he was not aware of LCOR's interest in purchasing that property until some time after Murray began working for Churchill. That testimony was resoundingly impeached.

21. Several days after LCOR and Murray submitted their proposed purchase agreements to Oliver Hoffmann, Oliver Hoffmann announced that it had rejected both offers. Instead, Oliver Hoffmann would prepare its own draft purchase agreement and submit it to both prospective purchasers with a blank space for the prices, inviting bids.

22. On February 26, 1997, LCOR sought and obtained from Judge James H. Alesia of this court a temporary restraining order (TRO) prohibiting Murray and others in concert with him from negotiating or closing a purchase of the River Run property. On March 7, 1997, Judge Alesia continued the TRO for an additional ten days, to March 17, 1997.

CONCLUSIONS OF LAW

1. The court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds the sum of $75,000, and all

Defendants are diverse in citizenship from Plaintiff LCOR. Venue properly lies in this district under 28 U.S.C. § 1391(b) because the claims arose here and Defendants are located here. In open court on Friday, March 14, 1997, all parties consented pursuant to 28 U.S.C. § 636(c) to proceeding before this court for purposes of this hearing and for entry of an order on Plaintiff's motion for preliminary injunction.

A. *Preliminary Injunction Standards*

2. A party seeking a preliminary injunction must, as part of its threshold showing, demonstrate that (1) it has some likelihood of prevailing; and (2) due to the absence of an adequate legal remedy, it will suffer irreparable harm if preliminary relief is denied. *Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir.1996); *Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir.1992); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387-87 (7th Cir.1984). The "likelihood of success" criterion is satisfied where the moving party shows a better than negligible likelihood that it will prevail on the merits. *See Publications Int'l*, 88 F.3d at 480 (citing *Roland Mach.*, 749 F.2d at 387). Harm is "irreparable" if it cannot be "prevented or fully rectified by the final judgment after trial." *Roland Mach.*, 749 F.2d at 386.

3. When the moving party meets this initial burden of proof, the court must then consider (3) whether the non-moving party would suffer irreparable harm if preliminary relief were granted, "balancing that harm against the irreparable harm to the moving party if relief is denied;" and (4) the interests of the public. *Pride Communications Ltd. Partnership v. WCKG, Inc.*, 851 F.Supp. 895,900 (N.D.Ill.1994) (quoting *Abbott Lab.*, 971 F.2d at 11-12). The court then " 'weighs' all four factors in deciding whether to grant the injunction, seeking at all times to 'minimize the costs of being mistaken.' " *Id.* (citing *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir.1986)).

B. *Choice of Law*

***6** 4. Plaintiff has argued that Pennsylvania law applies to LCOR's breach of fiduciary duty claims because LCOR is a Pennsylvania corporation, and the established rule of conflicts law provides that "[t]he corporate law of the state of incorporation is controlling with respect to the fiduciary duties of its directors as well as other internal corporate affairs." *Treco, Inc. v. Land of Lincoln Sav. and Loan*, 749 F.2d 374, 377 (7th Cir.1984); *see also CSFM Corp. v. Elbert & McKee Co.*, 870 F.Supp. 819, 830 (N.D.Ill.1994) (looking to the state of incorporation's law in a case involving fiduciary duty of an officer); *Claire's Stores, Inc. v. Abrams*, No. 86 C 9851, 1989 WL 134959, at *6 (N.D.Ill. Oct.19, 1989) (same). Defendants argue that Michael Murray was not an officer of LCOR and that his rights and responsibilities to LCOR are governed by Illinois law. The court sees no conflict between the law of Pennsylvania and that of Illinois with respect to the issues before it. Accordingly, the court will, where appropriate, cite to both Pennsylvania law and Illinois law with respect to LCOR's claims against Defendant Murray. For LCOR's other claims of tortious interference with contract and tortious inducement to breach fiduciary duties, Illinois law applies under a "most significant contacts" analysis. *Nelson v. Hix*, 122 Ill.2d 343, 349-50, 119 Ill.Dec. 355, 522 N.E.2d 1214, 1217 (Ill.1988) (applying most significant relationship test to tort action).

C. *Claims Against Murray*

5. Under both Illinois and Pennsylvania law, corporate officers owe a fiduciary duty of utmost good faith and loyalty to their corporate employers. *See Seaboard Indus., Inc. v. Monaco*, 442 Pa. 256, 276 A.2d 305, 308-09 (Pa.1971); *CST, Inc. v. Mark*, 360 Pa.Super. 303, 520 A.2d 469, 471 (Pa.Super.Ct.1987); *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1004 (3d Cir.1973) (applying Pennsylvania law); *Levy v. Markal Sales Corp.*, 268 Ill.App.3d 355, 364-65, 205 Ill.Dec. 599, 643 N.E.2d 1206, 1214 (1st Dist.1994). If an officer is presented with a business opportunity that is within the scope of his corporation's activities and of present or potential value to it, "the law will not permit him to seize the opportunity for himself." *Seaboard*, 276 A.2d at 309; *CST*, 520 A.2d at 471 (citations omitted). *See also S.N.T. Indus., Inc. v. Geanopulos*, 363 Pa.Super. 97, 525 A.2d 736, 739 (Pa.Super.Ct.1987) (defendants violated fiduciary duties by secretly negotiating lease on their own behalf while their corporation sought the same lease); *Levy*, 268 Ill.App.3d at 365, 205 Ill.Dec. 599, 643 N.E.2d at 1214 ("the corporate opportunity doctrine ... prohibits a corporation's fiduciary from taking advantage of business

opportunities which are considered as 'belonging' to the corporation.' " (citations omitted)); *Comedy Cottage, Inc. v. Berk*, 145 Ill.App.3d 355, 359-60, 99 Ill.Dec. 271, 495 N.E.2d 1006, 1011 (1st Dist.1986) (vice president entrusted with negotiating a lease for the plaintiff breached fiduciary duty by secretly obtaining lease for his own benefit).

***7** 6. Employees who are not officers or directors are also bound by fiduciary obligations. Thus, in *SHV Coal, Inc. v. Continental Grain Co.*, 376 Pa.Super. 241, 545 A.2d 917 (Pa.Super.Ct.1988), *rev'd on other grounds*,526 Pa. 489, 587 A.2d 702 (Pa.1991), the Pennsylvania appeals court reversed a judgment in favor of an employee who had breached his duty of loyalty to plaintiff corporation by diverting plaintiff's business to a competitor. Although defendant employee was not a corporate officer, the court observed that "[a]n agent is a fiduciary with respect to matters within the scope of his agency and is required to act solely for the benefit of his principal in all matters concerned with the agency." *Id.* at 921.

Similarly, in *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 191 Ill.Dec. 391, 623 N.E.2d 981 (2d Dist.1993), the court concluded that plaintiff corporation's former officers *and employees* had breached fiduciary duties to the corporation when they diverted potential corporate clients to their own competing businesses. *McKernan* recognized that although an employee is free to form a rival corporation while still employed by the competitor, he is bound by fiduciary duty not to go beyond preliminaries and begin a rival business.

"An employee need not be an officer or a director to be accountable since an agent must act solely for the principal in all matters related to the agency and refrain from competing with the principal." 252 Ill.App.3d at 530, 191 Ill.Dec. 391, 623 N.E.2d at 993-94. In *Mullaney, Wells & Co. v. Savage*, 78 Ill.2d 534, 37 Ill.Dec. 572, 402 N.E.2d 574 (1980), the defendant in an action for usurpation of a corporate investment opportunity was a former employee, but not an officer or director of plaintiff. Reversing a decision for defendant, the Illinois Supreme Court cited several cases for the proposition that "it is a breach of fiduciary obligation for a person to seize for his own advantage a business opportunity which rightfully belongs to the corporation by which he is employed." 78 Ill.2d at 545-46, 37 Ill.Dec. 572, 402 N.E.2d at 580. Although those cases involved officers and directors, the court noted that even a non-officer employee is "subject to fiduciary obligations with respect to the subject matter of his agency." *Id.* at 546, 37 Ill.Dec. 572, 402 N.E.2d at 580. *See also Regal-Beloit Corp. v. Drecoll*, No. 96 C 3694, 1996 WL 788936, at *9 (N.D.Ill. Aug.6, 1996) ("even if the Individual Defendants are not deemed to be officers of Regal-Beloit-a conclusion which is specious, at best given [defendants' high salaries and positions of authority] ...-, as employees, they still owe Regal-Beloit fiduciary duties of loyalty as to all matters within the scope of their employment.")

7. LCOR entered into a Letter of Intent for the purchase of River Run in November 1995, and remained interested in pursuing River Run throughout the period from the Letter of Intent to the present. LCOR's continued interest in the purchase is reflected in (1) its efforts to address the flood plain issue with its own engineers and those employed by Oliver Hoffmann and by the City of Naperville; (2) its attorney's drafting of several iterations of the purchase agreement in February, March, April, and December 1996; and (3) Ed Polich's discussions with Murray concerning the project, including the exchange of memoranda in November 1996 and January 1997. Whether or not the November 1995 Letter of Intent reflected a binding obligation on the part of Oliver Hoffmann, both Murray and LCOR could fairly have concluded that the Letter provided some protection for LCOR's interest in the purchase. Murray acknowledged in his November 11, 1996 memorandum that the seller had kept the property "off the market." Further, Mike Phillips testified that the seller's ordinary practice was to entertain a proposal from only one prospective purchaser at a time.

***8** 8. Murray was the principal LCOR representative entrusted with LCOR's pursuit of River Run. This court concludes that his fiduciary duties to LCOR extended at least to that effort. That is, Murray's fiduciary duties included the duty to use his best efforts to acquire River Run for LCOR, the duty not to pursue a purchase of River Run for his own benefit while still employed at LCOR, and the duty not to pursue an acquisition of River Run based on knowledge acquired during his employment at LCOR.

9. Defendant Murray has breached his fiduciary duties to LCOR in at least three ways. Murray failed to use his best efforts to obtain the River Run property for LCOR, and in fact competed with LCOR, his principal, while he was an agent acting on LCOR's behalf. As a fiduciary and agent, Murray was bound to act solely for the principal in all matters related to his agency. *E.J. McKernan Co.*, 252 Ill.App.3d at 530, 191 Ill.Dec. 391, 623 N.E.2d at 993-94.

10. Murray failed to transmit revised versions of a definitive purchase agreement to Oliver Hoffmann in February, March, and April 1996. Murray testified that Ed Polich instructed him not to forward the contracts to Oliver Hoffmann, but the court did not find this testimony credible. Later, in the final months of his employment at LCOR, while Murray was preparing to make an offer for River Run for his own benefit, Murray again failed to transmit a December 1996 revised draft purchase agreement. Nevertheless, he assured his superiors at LCOR that the deal was going forward and that a purchase agreement would be promptly executed.

11. Murray secretly negotiated with Oliver Hoffmann representatives to acquire River Run for his own benefit prior to his resignation. To that end, Murray caused Michigan Avenue Partners and Churchill to submit financial references and other information to Oliver Hoffmann in order to induce Oliver Hoffmann to accept Murray's offer. Murray also provided Lynch, Churchill, and Churchill's counsel with copies of the proposed purchase agreement that had been drafted by LCOR's counsel. Thus, Murray competed with LCOR while he was still an employee of LCOR, and breached his fiduciary duties to his employer by attempting to usurp LCOR's corporate opportunity to purchase the River Run property.

12. In addition to the prohibition against competing with their principals and usurping corporate opportunities, fiduciaries are also prohibited from taking advantage of the knowledge acquired in their principals' business to make a profit for themselves at their principals' expense. *Regal-Beloit Corp.*, 1996 WL 788936, at *16. In his employment with LCOR, Murray was privy to LCOR's business plans with respect to the River Run and Prairie Lakes projects. Murray has unlawfully taken information, draft contracts, and other materials from LCOR's files, and has used his intimate knowledge of LCOR and its plan to acquire and develop River Run in an effort to obtain River Run for himself. Such a misuse of the knowledge he acquired during his employment also constitutes a breach of fiduciary duty. *See* *Comedy Cottage*, 145 Ill.App.3d at 360, 99 Ill.Dec. 271, 495 N.E.2d at 1011; *Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy*, 415 Pa. 276, 203 A.2d 469, 470 (Pa.1964) ("we have long recognized that the use of confidential material obtained by an employee from a position of trust and confidence may not be used in later competition to the prejudice of his employer"). *Cf* *Spring Steels, Inc. v. Molloy*, 400 Pa. 354, 162 A.2d 370 (Pa.1960) (former employee may use non-confidential customer lists although he "cannot properly use confidential information peculiar to his employer's business and acquired therein"); *Renee Beauty Salons, Inc. v. Blose-Venable*, 438 Pa.Super. 601, 652 A.2d 1345 (Pa.Super.Ct.1994) (same).

***9** 13. Murray began his improper pursuit of River Run before he resigned. The resignation of an officer does not diminish liability for transactions which the officer attempts to complete after his resignation if the transaction began during his employment. *Dowell v. Bitner*, 273 Ill.App.3d 681, 691,652 N.E.2d 1372, 1379-80 (4th Dist.1995); *Mullaney*, 78 Ill.2d 534, 37 Ill.Dec. 572, 402 N.E.2d 574. Moreover, even assuming *arguendo* that Murray did not begin competing for River Run until after his resignation, he would remain bound by his fiduciary duty not to undertake a transaction founded on information acquired during his employment. *Dowell*, 273 Ill.App.3d at 691, 210 Ill.Dec. 396, 652 N.E.2d at 1379-80; *Comedy Cottage*, 145 Ill.App.3d at 360-61, 99 Ill.Dec. 271, 495 N.E.2d at 1011-12.

14. The court concludes that Plaintiff LCOR has demonstrated some likelihood of success in its claims that Defendant Murray breached his fiduciary duties to LCOR.

D. *Claims against Michigan Avenue Partners and Churchill*

15. Under Illinois law, any third party that has "colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom," is liable to that fiduciary's principal. *Chicago Park Dist. v. Kenroy, Inc.*, 78 Ill.2d 555, 565, 37 Ill.Dec. 291, 402 N.E.2d 181, 186 (1980); *Corroon & Black of Illinois,*

Inc. v. Magner, 145 Ill.App.3d 151, 161, 98 Ill.Dec. 663, 494 N.E.2d 785, 790 (1st Dist.1986). Michigan Avenue Partners and Churchill knowingly induced and intimately participated in Murray's scheme to pursue River Run and are, therefore, liable to LCOR. *See* *Kenroy*, 78 Ill.2d at 565, 37 Ill.Dec. 291, 402 N.E.2d at 186; *Corroon*, 145 Ill.App.3d at 161, 98 Ill.Dec. 663, 494 N.E.2d at 790. To establish these defendants' liability, LCOR needs to show that (1) Michigan Avenue Partners and Churchill committed an act that furthered or completed Murray's breach of trust and (2) they knew or should have known that Murray's pursuit of River Run was a breach of LCOR's trust. *Chabraja v. Martwick*, 248 Ill.App.3d 995, 998, 188 Ill.Dec. 230, 618 N.E.2d 800, 803 (1st Dist.1993).

16. Michigan Avenue Partners' and Churchill's financial backing of Defendant Murray's wrongdoing, their own pursuit of River Run, and their tender of an offer through Murray furthered Murray's breach. Additionally, these Defendants actively participated with Murray by colluding with him to make an offer for River Run and by misusing LCOR's information and resources to do so. *See* *id.* at 998-99, 188 Ill.Dec. 230, 618 N.E.2d at 803.

17. Michigan Avenue Partners actively participates in, acts in concert with, and operates under the same management as Churchill for the acquisition and development of parcels of property, including River Run. Churchill and Michigan Avenue Partners share a common business address and telephone and facsimile numbers. As president and sole shareholder/managing member of both entities, Michael Lynch makes all operating and management decisions for Michigan Avenue Partners and Churchill. Lynch knew or should have known that Murray's desire to purchase River Road on his own behalf constituted a violation of his fiduciary duties to LCOR. Nevertheless, within twenty-four hours of Murray's resignation, Murray and Churchill submitted a 16-page offer to Oliver Hoffmann that was virtually identical to the proposed offer provided to Murray by LCOR. Moreover, in anticipation of this lawsuit, Lynch/Churchill agreed to indemnify Oliver Hoffmann for its costs in responding to the claims now made by LCOR.[FN7]

FN7. The Indemnification Agreement was transmitted from the offices of Michigan Avenue Partners and on Michigan Avenue Partners' facsimile letterhead.

***10** 18. This evidence supports an inference that Lynch, Michigan Avenue Partners, and Churchill cooperated with Murray in his diversion of LCOR's corporate opportunity. *See* *Jason Winter's Herbaltea Ltd. (Bahamas) v. Flemming Imports Corp.*, 494 F.Supp. 828, 831 (N.D.Ill.1980) (holding third parties liable for having cooperated in a breach of fiduciary duties where the only "reasonable inference" is that they directly cooperated in the fiduciary's "self-aggrandizement"); *Zokoych v. Spalding*, 36 Ill.App.3d 654, 668-70, 344 N.E.2d 805, 817-18 (1st Dist.1976) (finding third party liable for cooperating in fiduciary's scheme to breach his duties because the third party knew or should have known of the fiduciary's wrongdoing). That Michigan Avenue Partners and Churchill have benefited from Murray's fiduciary breaches is undeniable; they obtained access to the River Run purchase opportunity, an opportunity that would not have been available to these Defendants in the absence of Murray's breach of his fiduciary duties to LCOR.[FN8]

FN8. Defendants argue that they cannot be liable for tortiously interfering with a contractual relationship because no contract exists between LCOR and Oliver Hoffmann. *See e.g.*, *Jacobs v. Mundelein College, Inc.*, 256 Ill.App.3d 476, 483, 194 Ill.Dec. 704, 628 N.E.2d 201, 206 (1st Dist.1993). LCOR has argued that a letter of intent may be enforceable under Illinois law. At a minimum, a letter of intent may impose an obligation on the parties to negotiate in good faith. *See* *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 433 (7th Cir.1993); *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M. C. Chem. Group, Inc.*, 873 F.2d 155, 158 (7th Cir.1989). In light of its conclusion that Michigan Avenue Partners and Churchill Properties are liable on a breach of fiduciary duty theory, the court need not reach the merits of LCOR's tortious interference claims against these Defendants.

19. The court concludes that LCOR has demonstrated some likelihood of prevailing on its claims against Defendants Michigan Avenue Partners, and Churchill

Properties, L.L.C.

E. *Irreparable Injury*

20. In order to establish irreparable injury in the absence of a preliminary injunction, a plaintiff must demonstrate that an award of damages would be "seriously deficient as a remedy for the harm suffered." *Roland Mach.,* 749 F.2d at, 386. Plaintiff can satisfy this burden by demonstrating "that an award of damages would come too late to remedy the harm; that Defendant may not be capable of satisfying a damages award or that the nature of Plaintiff's loss renders damages too difficult to calculate." *Williams v. National Housing Exch., Inc.,* No. 95 C 4243, 1995 U.S. Dist. LEXIS 17290, at *76 (N.D.Ill. Nov. 9, 1995) (citing *Roland*, 749 F.2d at 386). Irreparable injury is often presumed where the purchase and sale of a parcel of real estate is involved. *See Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir.1989) (in general, interference with the enjoyment or possession of land is "irreparable" because land is "a unique commodity for which monetary compensation is an inadequate substitute").

21. LCOR has established that it will suffer substantial and irreparable injury if Murray and Churchill are allowed to proceed with their attempt to purchase River Run. If Murray and Churchill are not enjoined and are awarded the contract for the River Run property in the auction procedure planned by Oliver Hoffmann, Murray and Churchill would likely finance the purchase of the property by obtaining an acquisition loan, resulting in liens being placed on River Run. If they are not enjoined and LCOR eventually wins the imposition of a constructive trust, LCOR would be forced to take possession of LCOR subject to the loan terms and conditions obtained by Murray and Churchill-terms which may be substantially less favorable than those available to LCOR on its own. LCOR would also be unable to avail itself of protections provided by the terms of its Letter of Intent, such as price, zoning and governmental approval contingencies, as well as a study period for certain testing and warranties. Furthermore, any attempt by this Court to unwind a potential transaction would be extremely difficult and would be potentially unfair to innocent third parties, such as a third-party lender. *See Regal-Beloit, supra*, at *16-17.

***11** 22. The irreparable injury to LCOR would be even greater if Murray and Churchill are not enjoined and LCOR is effectively precluded from acquiring River Run altogether. River Run offers LCOR a unique property in an attractive market. The potential market value cannot be adequately measured or quantified. Nor would the profits earned by another buyer be an accurate measure of profits potentially earned by LCOR. Finally, should LCOR lose the opportunity to acquire River Run, LCOR could lose any goodwill built up in the Naperville community during the course of its pursuit of River Run and its development of Prairie Lakes.

F. *Inadequacy of Remedy At Law*

23. Neither monetary damages nor the imposition of a constructive trust can adequately compensate LCOR for its potential loss. Because of the nature of the property and the business at issue, compensatory damages awarded at the end of a trial would be seriously deficient in light of the harm imposed by Murray. *See Medco Research, Inc. v. Fujisawa USA, Inc.*, Nos. 93 C 2705, 93 C 2724, 1994 WL 719220, at *12 (N.D.Ill.Dec.21, 1994) (a litigant seeking injunctive relief must demonstrate that monetary damages will be seriously deficient, not that such an award may be wholly ineffectual). As discussed above, if Murray and Churchill are not enjoined here, LCOR stands to lose its opportunity to purchase and develop a unique property and will also lose substantial goodwill.[FN9] Moreover, a constructive trust would not put LCOR in the same position it would have been absent Murray's breaches of fiduciary duty and the defendants' tortious conduct.

> FN9. In the analysis of whether an injunction should issue, the irreparable harm and lack of adequate remedy at law requirements tend to merge. *Medco, supra*, at * 12.

24. Additionally, LCOR has no adequate remedy at law because certain components of its damages are not readily quantifiable. Specifically, LCOR's potential lost profits from River Run, its lost goodwill in Naperville, the disruption of LCOR's expansion efforts in Naperville, and LCOR's goodwill and relationship with Oliver Hoffmann are not readily

quantifiable. When such harm cannot be fully quantified, injunctive relief is the only appropriate remedy. *See Illinois Sporting Goods Ass'n v. County of Cook*, 845 F.Supp. 582, 585 (N.D.Ill.1994) damage award may be inadequate-and injunction therefore appropriate-where "[p]laintiffs' losses make damages difficult to calculate, such as lost business profits"; *Menominee Rubber Co. v. Gould, Inc.*, 657 F.2d 164, 167 (7th Cir.1981) (substantial "loss of goodwill and disruption of [plaintiff's] business ... constitute 'irreparable harm' ").

G. *Balance of Harms and the Public Interest*

25. The balance of harms here favors LCOR. The potential harm to Murray, Churchill, and Michigan Avenue Partners from entry of a preliminary injunction order enjoining their purchase of River Run is slight. At most, their attempted acquisition of River Run will be delayed only until a trial on the merits of this dispute. Moreover, in this Circuit, courts utilize a "sliding scale" in determining the relative harm to the parties from entry of an injunction. *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1453 (7th Cir.1995) (citing *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir.1994)). Thus, because LCOR has a significant chance of success on the merits, the showing that LCOR must make that the balance of harms is in its favor is less stringent.

CONCLUSION

***12** For all the foregoing reasons, this Court concludes that a preliminary injunction should be entered enjoining Defendants Murray, Churchill, Michigan Avenue Partners, and all others in active concert or participation with them from negotiating or closing any acquisitions of the River Run property owned by Oliver Hoffmann Corporation. Defendants have offered no evidence that entry of a preliminary injunction would place them in any financial jeopardy. Accordingly, the court concludes that a modest bond is appropriate to protect Defendants against the risk of improvident entry of a preliminary injunction order. The court sets bond in the amount of $10,000.00. Plaintiff LCOR Incorporated is directed to submit a form order of entry of a preliminary injunction and post bond on or before noon, Thursday, March 20, 1997.

N.D.Ill.,1997.
LCOR Inc. v. Murray
Not Reported in F.Supp., 1997 WL 136278 (N.D.Ill.)

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TAB 6

People v. Wisbrock
Ill.App. 3 Dist.,1991.

Appellate Court of Illinois,Third District.
The PEOPLE of the State of Illinois, Plaintiff-Appellant,
v.
Kenneth R. WISBROCK, Defendant-Appellee.
No. 3-91-0303.

Dec. 24, 1991.

In prosecution for driving under influence of alcohol, the 13th Judicial Circuit Court, LaSalle County, James A. Lanuti, J., granted defendant's motion to prevent State from entering into evidence results of defendant's breathalyzer test. State appealed. The Appellate Court, Slater, J., held that State was judicially estopped from introducing breathalyzer results into evidence.

Affirmed.

West Headnotes

[1] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases
Doctrine of judicial estoppel provides that when party assumes certain position in legal proceeding, that party is estopped from assuming contrary position in subsequent legal proceeding.

[2] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases
For doctrine of judicial estoppel to apply, party must have taken two positions, positions must have been taken in separate judicial or quasi-judicial administrative proceedings, party must have intended for trier of fact to accept truth of facts alleged in support of position, party must have succeeded in asserting first position and received some benefit from it, and two positions must be inconsistent.

[3] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases
State was judicially estopped from attempting to use result of deficient breathalyzer test in DUI proceeding in attempt to convict defendant, as State initially took position that defendant had refused to take breathalyzer test, and on that basis, Secretary of State summarily suspended defendant's driver's license.

****514 *174 ***335** Gary F. Gnidovec, States' Attys. Appellate Prosecutor, Joseph Navarro, State's Atty., Ottawa, for the People.
Darrell K. Seigler, Ottawa, for Kenneth R. Wisbrock.

Justice SLATER delivered the opinion of the court:
The defendant, Kenneth Wisbrock, made an oral motion *in limine* seeking to prevent the State from entering into evidence the result of his breathalyzer test. The trial court granted his motion, and the State appeals.

The record shows that after the defendant was arrested for driving under the influence of alcohol (DUI), he attempted to take a breathalyzer test. The

machine issued a result reading ".11 deficient sample." According to the arguments presented by trial counsel in the court below, the State summarily suspended the defendant's driver's license due to his refusal to submit to blood-alcohol content testing (Ill.Rev.Stat.1989, ch. 95 1/2 , par. 11-501.1). In other words, the State viewed providing a deficient sample as equivalent to refusing to take the breathalizer test. (We note that the State also contended below that the defendant's refusal to take a blood test at a hospital was another basis upon which his license had been summarily suspended. However, it appears that the parties now agree on appeal that the basis for the license suspension was the deficient breathalyzer sample.)

Prior to his DUI trial, the defendant made an oral motion *in limine* to preclude the State from using as evidence the ".11 deficient sample" test result. At the hearing on the motion, the defendant argued that because the deficient test result was used to establish a refusal to complete the test, thereby warranting the summary suspension of his driver's license, the State was precluded from using the test result to prosecute the defendant for DUI. The defendant also argued that the deficient breathalyzer sample was subject to exclusion because a proper foundation for its admission could not be established pursuant to section 11-501.2(a)(1) of the Illinois Vehicle Code (Ill.Rev.Stat.1989, ch. 95 1/2 , par. 11-501.2(a)(1)). The trial court concluded that the incomplete or deficient test result did not comport with the standards of the Department of Public Health as required by section 11-501.2 of the Illinois Vehicle Code (Ill.Rev.Stat.1989, ch. 95 1/2 , par. 11-501.2) and granted the defendant's motion *in limine.*

175** On appeal, the State argues that the trial court erred. It contends that the breathalyzer result did comport with the requirements*515 ***336** of section 11-501.2(a)(1) of the Illinois Vehicle Code and that the deficiency of the sample should merely have affected the weight the trier of fact gave the test result. Additionally, the State contends that it should not be precluded from utilizing a breathalyzer result in a DUI trial, even if the same breathalyzer result has been construed as a refusal by the defendant and therefore used to summarily suspend his driver's license.

[1][2] We hold that the doctrine of judicial estoppel is applicable in the instant case. The doctrine of judicial estoppel provides that when a party assumes a certain position in a legal proceeding, that party is estopped from assuming a contrary position in a subsequent legal proceeding. (*Department of Transportation v. Coe* (1983), 112 Ill.App.3d 506, 68 Ill.Dec. 58, 445 N.E.2d 506.) For the doctrine to apply, five factors must be present: (1) the party must have taken two positions; (2) the positions must have been taken in separate judicial or quasi-judicial administrative proceedings; (3) the party must have intended for the trier of fact to accept the truth of the facts alleged in support of the position; (4) the party must have succeeded in asserting the first position and received some benefit from it; and (5) the two positions must be inconsistent. *Galena Park Home v. Krughoff* (1989), 183 Ill.App.3d 206, 131 Ill.Dec. 810, 538 N.E.2d 1366.

[3] In the instant case, the State initially took the position that the defendant had refused to take the breathalyzer test. On that basis, the Secretary of State summarily suspended his driver's license. It then took an inconsistent position in the DUI proceeding by attempting to use the result of the test to help convict the defendant. Under these circumstances, we find that the State was judicially estopped from using the breathalyzer result in the DUI trial. Accordingly, the trial court properly granted the motion *in limine. People v. Williams* (1978), 60 Ill.App.3d 529, 18 Ill.Dec. 214, 377 N.E.2d 367; *Material Service Corp. v. The Department of Revenue* (1983), 98 Ill.2d 382, 75 Ill.Dec. 219, 457 N.E.2d 9 (The trial court's judgment may be sustained on any ground warranted.).

Our disposition of the instant case on the basis of the doctrine of judicial estoppel makes it unnecessary to address the State's argument that the deficient sample complied with the Illinois Vehicle Code.

The judgment of the circuit court of LaSalle County is affirmed.

Affirmed.

BARRY and McCUSKEY, JJ., concur.
Ill.App. 3 Dist.,1991.
People v. Wisbrock
223 Ill.App.3d 173, 584 N.E.2d 513, 165 Ill.Dec. 334

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TAB 7

Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.
Ill.App. 2 Dist.,1994.

Appellate Court of Illinois,Second District.
WATERFORD EXECUTIVE GROUP, LTD., Plaintiff-Appellant,
v.
CLARK/BARDES, INC., et al., Defendants-Appellees.
No. 2-93-0373.

April 22, 1994.
As Modified on Denial of Rehearing May 24, 1994.

Employee recruiting agency brought breach of contract action, seeking compensation for its presentation of job applicant who was subsequently hired by defendants. The Circuit Court, Lake County, William D. Block, J., dismissed action with prejudice. Agency appealed. The Appellate Court, Doyle, J., held that: (1) agency did not fall within "management executive recruiting" exception to licensing requirements of Private Employment Agency Act, and (2) trial court properly denied agency's substituted counsel's motion for leave to file amended motion for reconsideration with supporting exhibits.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A 561.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases
For purposes of statute providing for dismissal of complaint when underlying claim is barred by affirmative matter, "affirmative matter" includes something in nature of defense that completely negates alleged cause of action. S.H.A. 735 ILCS 5/2-619(a)(9).

[2] Pretrial Procedure 307A 679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of Pleadings. Most Cited Cases
For purposes of resolving motion to dismiss on ground that underlying claim is barred by affirmative matter, all well-pleaded facts, as well as reasonable inferences to be drawn from those facts, are taken as true. S.H.A. 735 ILCS 5/2-619(a)(9).

[3] Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases
Motion to dismiss on ground that underlying claim is barred by affirmative matter should be supported by affidavit where grounds for dismissal do not appear on face of pleadings. S.H.A. 735 ILCS 5/2-619(a)(9).

[4] Pretrial Procedure 307A 561.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases
Trial court should grant motion to dismiss on ground that underlying claim is barred by affirmative matter if, after construing document supporting motion in light most favorable to opposing party, it finds no disputed issues of fact and concludes that affirmative matter negates plaintiff's cause of action completely

or refutes critical conclusions of law or conclusions of material, unsupported fact. S.H.A. 735 ILCS 5/2-619(a)(9).

[5] Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases
In ruling on motion to dismiss on ground that underlying claim is barred by affirmative matter, trial court may not consider arguments and matters unsupported by affidavit. S.H.A. 735 ILCS 5/2-619(a)(9).

[6] Appeal and Error 30 842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
Reviewing court's consideration of dismissal on ground that underlying claim is barred by affirmative matter is limited to consideration of legal questions presented by pleadings, but such review is independent and need not defer to trial court's reasoning. S.H.A. 735 ILCS 5/2-619(a)(9).

[7] Labor and Employment 231H 937

231H Labor and Employment
231HXI Employment Agencies
231Hk937 k. Regulation and Regulatory Agencies. Most Cited Cases
(Formerly 232Ak18 Labor Relations)
Employer recruiting firm did not fall within "management executive recruiting" exception to licensing requirements of Private Employment Agency Act, as that exception requires that firm "acts solely on behalf of * * * an employer," and firm in question circulated applicant's resume to employers other than one who ultimately hired applicant. S.H.A. 225 ILCS 515/11.

[8] Statutes 361 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Where legislative terms have not been defined by statute nor judicially interpreted, court is guided by both plain meaning of statute and legislative intent.

[9] Statutes 361 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
Primary rule in statutory construction, to which all other rules are subordinate, is to determine and give effect to true intent of legislature.

[10] Statutes 361 205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
To determine legislative intent, statutory language is examined as whole, and each part is considered in connection with every other part.

[11] Statutes 361 214

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k214 k. In General. Most Cited Cases
Where statutory language is clear, it should be given effect without resorting to other aids for construction.

[12] Labor and Employment 231H 936

231H Labor and Employment
231HXI Employment Agencies
231Hk936 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 232Ak18 Labor Relations)
Management executive recruiting exception to licensing requirements of Private Employment Agency Act provides for very limited exception to strict licensing requirements of Act only where management executive recruiting firm is acting solely on behalf of, and is compensated solely by employer; this exception is limited to situations where recruiting firm is acting as agent for hiring employer and not as independent third party to negotiations between applicant and one or more potential employers. S.H.A. 225 ILCS 515/11.

[13] Motions 267 39

267 Motions
267k39 k. Reargument or Rehearing. Most Cited Cases
Trial court properly denied plaintiff's substituted counsel's motion for leave to file amended motion for reconsideration with supporting exhibits, which was filed prior to substituted counsel's entering appearance; defendants' motion to strike effectively placed plaintiff's counsel on notice of problem, which counsel subsequently remedied by filing motion for substitution of counsel and, despite plaintiff's counsel's ability to file motion for leave to amend pending motion prior to hearing, thereby seeking to correct problem of his premature filings, he took no such action. Sup.Ct.Rules, Rule 183.

[14] Pleading 302 333

302 Pleading
302XIII Filing and Service
302k333 k. Time for Filing or Service. Most Cited Cases
Grant or denial of motion for extension of time for filing any pleading or doing of any act that is required to be done within limited period falls within sound discretion of trial court. Sup.Ct.Rules, Rule 183.

[15] Pleading 302 333

302 Pleading
302XIII Filing and Service
302k333 k. Time for Filing or Service. Most Cited Cases
Inadvertence, mistake, or absence of prejudice to opposing party or inconvenience to trial court does not constitute "good cause" that would justify extending time for filing pleading or doing act required to be done within limited period. Sup.Ct.Rules, Rule 183.

***339 ***209 **1005** Patrick I. Hartnett, Hartnett & Hartnett, Chicago, Robert D. Shearer, Stern & Rotheiser, Chicago (argued), for Waterford Executive Group.
John D. Lien, Christopher W. Brownell (argued), Foley & Lardner, Chicago, for Clark/Bardes, Inc. and W.T. Wamberg.

Justice DOYLE delivered the opinion of the court:
Plaintiff, Waterford Executive Group, Ltd. (Waterford), brought an action in the circuit court of Lake County for breach of contract against defendants, Clark/Bardes, Inc., and W.T. Wamberg (collectively referred to as Clark/Bardes). The suit sought compensation for plaintiff's presentation of a job applicant who was subsequently hired by defendants. Defendants filed motions to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 1992)) arguing that even if the contract alleged in plaintiff's complaint existed, it was illegal and void under the Private Employment Agency Act (Act) (225 ILCS 515/1*et seq.* (West 1992)) because plaintiff and its agent, Patrick Atkinson, were not licensed to make such a contract. On January 6, 1993, the trial court granted defendants' section 2-619 motions and dismissed the matter with prejudice after determining, as a matter of law, that plaintiff did not fall within the

"management executive recruiting" exception (see 225 ILCS 515/11 (West 1992)) to the licensing requirements of the Act.

On February 3, 1993, the trial court granted plaintiff's motion for leave to file, *instanter*, a "Motion for Rehearing or Reconsideration or Other Relief." Plaintiff's motion argued that the trial court had failed to consider material evidence which had not been available to the court and urged that the trial court's previous order be vacated. On February 5, 1993, an "Amended Motion for Rehearing or Reconsideration or Other Relief" was filed on plaintiff's behalf by Pat Hartnett, who was not an attorney of record in the matter. Defendants moved ***340** to strike both motions, arguing the latter motion had been filed in violation of Supreme Court Rule 137 (134 Ill.2d R. 137) because it had not been signed by an attorney of record for plaintiff. On February 24, 1993, Hartnett filed a response to defendants' motions to strike to which was appended an undated form entitled "Substitution of Attorney." Later, on March 1, 1993, Hartnett filed a motion for substitution of attorneys on plaintiff's behalf which the trial court granted.

On March 3, 1993, the trial court denied plaintiff's motion for rehearing or reconsideration or other relief. All motions and filings by attorney Hartnett filed prior to his substitution in the case on March 1, 1993, were stricken because they had not been signed by an attorney of record. On March 29, 1993, plaintiff filed a "Motion for Leave to File an Amended Motion for Reconsideration and Response to Defendant's Motion to Strike." The trial court denied plaintiff's motion and this appeal followed.

Plaintiff raises two issues on appeal: (1) whether the trial court erred in determining that plaintiff was not engaged in a "management consulting" or "management executive recruiting" relationship with defendants; and (2) whether the trial court abused its discretion****1006 ***210** in denying plaintiff's motion for leave to file an amended motion for reconsideration.

Plaintiff's complaint stated, "On or about August 15, 1991, [Julieann Schneidereit (Schneidereit)] authorized [plaintiff] to seek employment or placement in the executive benefits consulting industry. The account representative was Patrick Atkinson." It alleged that on August 19, 1992, Clark/Bardes agreed to compensate plaintiff in an amount equal to 30% of Schneidereit's anticipated salary for her placement of Schneidereit if defendant did choose to offer her employment and she accepted that offer. Plaintiff further alleged that Atkinson called Schneidereit on August 20, 1991, and obtained her permission to send a faxed copy of her resume on plaintiff's letterhead to Clark/Bardes' Chicago office, and Atkinson transmitted the resume to defendants on the following day. Plaintiff's complaint stated that on September 19, 1991, Wamberg instructed Atkinson to send him one copy of Schneidereit's resume and another to John Walker, Clark/Bardes chief executive officer (CEO), in Dallas, Texas. Atkinson transmitted these resumes on plaintiff's letterhead later that day.

The cover letter which accompanied the faxed resumes provided, in part:

***341** "SERVICE CHARGE: 30% of the Candidate's Annual Estimated First Year Income

1. [Waterford] reserves the right to include a reasonable amount of commissions, bonuses and other cash incentives in addition to base salary when determining a candidate's annual estimated first year income. The candidate's current income and market value will be a strong determining factor.

2. An offer of employment to a referred candidate by a company shall indicate acceptance of this fee schedule.

3. Anyone referring a [Waterford] referred candidate to any other department, affiliated organization or any other company that subsequently employs that candidate shall be held liable for that fee to [Waterford]."

Various telephone calls and meetings occurred between Atkinson, Wamberg, other employees of Clark/Bardes, and Schneidereit. In December 1991, Schneidereit was offered and accepted a position with Clark/Bardes at a base salary of $125,000 and anticipated annual earnings in excess of $300,000.

Defendant filed a section 2-619 motion to dismiss along with several affidavits. Schneidereit's affidavit stated that sometime in mid-August 1991, while she was employed with Corporate Compensation Plans,

Inc. (CCPI), Atkinson, an employee of Waterford, contacted her concerning a job opening at Mercer-Meidinger, Inc. (Mercer). This was Schneidereit's first contact with plaintiff or its agents. Schneidereit indicated that she was not interested in Mercer's position, but she would be interested in leaving CCPI for a Chicago or East Coast job in the executive benefits consulting industry. Atkinson told her that he might be able to help, and he subsequently made contacts on her behalf with various companies in the executive benefits consulting industry, including the Management Compensation Group and the Todd Organization.

Affidavits of Wamberg and Walker indicated that late in August 1991 Atkinson telephoned defendant Wamberg seeking employment for Schneidereit. Late in September 1991, Atkinson telephoned Walker, Clark/Bardes' CEO, seeking employment for Schneidereit. Defendants maintained that both of these contacts were initiated by Atkinson and neither were solicited by defendants. Defendants characterize Atkinson's contacts as attempts to secure employment on behalf of Schneidereit and note that Atkinson contacted other companies besides Clark/Bardes on her behalf. Defendants deny that there was ever any agreement, written or oral, between themselves and plaintiff whereby plaintiff was retained to identify, appraise, or recommend a job applicant for defendants.

***342** In its reply to defendants' section 2-619 motion, plaintiff stated that "during the times indicated, pursuant to the agreement with the Defendant, wherein the Defendant sought individuals for a certain position, and retained the Plaintiff to fill this position, and agreed to pay the fee to the Plaintiff, the ****1007 ***211** Plaintiff undertook to find a qualified applicant, including but not limited to [Schneidereit]." Plaintiff then went on to deny that it had a contract with Schneidereit, claiming instead that the "account was solely with the Defendant." Plaintiff also claimed that at the time Atkinson contacted Schneidereit, "the Plaintiff was already aware of a job opening with Defendants * * * since the Plaintiff had already entered into an agreement with the Defendant to be retained by the Defendant, and to act solely on behalf of the Defendant, to find a qualified applicant for the Defendant, for an agreed fee."

In support of its contentions, plaintiff attached the affidavit of Patrick Atkinson. Atkinson's affidavit admitted that he contacted Schneidereit but failed to specify when this occurred. Atkinson averred that he entered into an oral agreement with defendants to fill the subject position in August 1991, but made no reference to whether this occurred before or after his initial contact with Schneidereit. Atkinson did aver "[t]hat subsequent to the initial contact and agreement with the defendants, wherein the defendants retained [plaintiff] * * * I solicited numerous applicants in my files, in my office * * * including [Schneidereit]."

It was undisputed that neither plaintiff nor Atkinson held a license under the Act to act, respectively, as an employment agency or employment counsellor. Regarding Schneidereit's introduction to other potential employers, plaintiff filed affidavits averring that it was usual and customary for plaintiff, and those in the industry, to retain a pool of applicants to draw upon in attempting to fill a job position and that it was normal and customary within their industry, when trying to place a job candidate into a specific company for a specific opening, to contact similar companies to seek out other similar job openings to increase the visibility of the candidate and enhance the possibility of placement. These affidavits also averred that, in the industry, a nonlicensed contingency search firm is due a placement fee from the hiring company if and when a candidate that has been presented to them is hired regardless of whether the firm "was actively recruiting on a 'sanctioned' search or simply presenting a job candidate to a potential hiring company on an opportunistic basis."

At a hearing on defendants' motions, plaintiff's counsel argued that the phrase "acts solely on behalf of * * * an employer" contained ***343** in the exception to the Act's definition of an "employment agency" precluded plaintiff from acting on behalf of the job applicant, but placed no restriction on plaintiff's ability to act on behalf of more than one employer with respect to the same job applicant. After the trial court expressed disagreement with this assertion, plaintiff's counsel argued that defendants had failed to introduce any evidence that plaintiff referred Schneidereit to other employers after she had been referred to defendants. The trial court then inquired whether plaintiff felt the timing of the referrals of the job applicant to the various employers

was a factual issue in the case. Plaintiff's counsel responded that the issue was irrelevant, and the trial court stated that it would consider counsel's statement as a judicial admission, binding on plaintiff, that there was no genuine issue of material fact with respect to defendants' section 2-619 motions.

The trial court found that plaintiff and its agent were not licensed under the Act; that based upon the pleadings, motions, affidavits and admissions of counsel in open court, there was no issue of material fact with respect to defendants' section 2-619 motions; and that, as a matter of law, plaintiff did not act solely on behalf of defendants as required to meet the exemption to the definition of an "employment agency" under the Act.

[1][2][3] Section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 1992)) provides for the dismissal of a complaint when the underlying claim is barred by an affirmative matter. An affirmative matter includes something in the nature of a defense that completely negates the alleged cause of action. (*Meyers v. Rockford Systems, Inc.* (1993), 254 Ill.App.3d 56, 61, 192 Ill.Dec. 761, 625 N.E.2d 916.) For purposes of resolving a motion under section 2-619, all well-pleaded facts in the complaint are taken as true as well as the reasonable inferences to be drawn from those facts. (****1008***212***Employers Mutual Cos. v. Skilling* (1994), 256 Ill.App.3d 567, 196 Ill.Dec. 301, 302-03, 629 N.E.2d 1145, 1146-47; *Pechan v. DynaPro, Inc.* (1993), 251 Ill.App.3d 1072, 1083-84, 190 Ill.Dec. 698, 622 N.E.2d 108.) Where the grounds for dismissal do not appear on the face of the pleadings, the section 2-619 motion should be supported by affidavits. *Pechan*, 251 Ill.App.3d at 1083, 190 Ill.Dec. 698, 622 N.E.2d 108.

[4][5][6] A section 2-619 motion should be granted by the trial court if, after construing the documents supporting the motion in the light most favorable to the opposing party, it finds no disputed issues of fact (*Meyers*, 254 Ill.App.3d at 61, 192 Ill.Dec. 761, 625 N.E.2d 916) and concludes that the affirmative matter negates the plaintiff's cause of action completely or refutes critical conclusions of law or conclusions of material, unsupported fact (*Employers Mutual*, 256 Ill.App.3d at 569, 196 Ill.Dec. at 302-03, 629 N.E.2d at 1146-47). A trial court may not consider arguments and matters unsupported by affidavit. (See ***344***Franzen-Peters, Inc. v. Barber-Greene Co.* (1987), 155 Ill.App.3d 957, 961, 108 Ill.Dec. 538, 508 N.E.2d 1115.) A reviewing court's consideration of a dismissal pursuant to a section 2-619 motion is limited to consideration of the legal questions presented by the pleadings, but such review is independent and need not defer to the trial court's reasoning. *Employers Mutual*, 256 Ill.App. at 569, 196 Ill.Dec. at 302-03, 629 N.E.2d at 1146-47.

[7] It was undisputed that plaintiff was not licensed to do business as an employment agency under the provisions of the Act. Plaintiff concedes that an unlicensed employment agency is prohibited from recovering a fee for the placing of a job applicant with an employer. (See *Management Recruiters of O'Hare, Inc. v. Process & Environmental Equipment Unlimited, Inc.* (1985), 137 Ill.App.3d 513, 521, 92 Ill.Dec. 152, 484 N.E.2d 883; *T.E.C. & Associates, Inc v. Alberto-Culver Co.* (1985), 131 Ill.App.3d 1085, 1095-96, 87 Ill.Dec. 220, 476 N.E.2d 1212.) The central inquiry of defendants' section 2-619 motion, therefore, was whether the plaintiff was operating as an "employment agency" within the context of the Act.

Section 11 of the Act provides, in part:

"The term 'employment agency' means any person engaged for gain or profit in the business of securing or attempting to secure employment for persons seeking employment or employees for employers. However, the term 'employment agency' shall not include any person engaged in the business of management consulting or management executive recruiting, and who in the course of such business *is retained by, acts solely on behalf of, and is compensated solely by, an employer* to identify, appraise or recommend an individual or individuals for consideration for an executive or professional position, provided that: (a) the compensation for each such position is at the rate of not less than $15,000 per year; and (b) in no instance is the individual who is identified, appraised or recommended for consideration for such position charged a fee directly or indirectly in connection with such identification, appraisal or recommendation, or for preparation of any resume, or on account of any other personal service performed by the person engaged in the business of management consulting or management executive recruiting." (Emphasis added.) 225 ILCS

515/11 (West 1992).

It is plaintiff's position that its activity in arranging Schneidereit's employment with defendants falls within the "management executive recruiting" exception to the licensing requirements of the Act.

Plaintiff argues that a recruiting firm is not disqualified from the management executive recruiting exception merely because it circulated an applicant's resume to employers other than the one who ultimately hired the applicant. Plaintiff urges that the terms "act solely on behalf of * * * an employer" should be interpreted in light of the custom and usage within the recruiting industry to mean ***345** agencies that are retained by and paid by employers, as a class, rather than by applicants.

[8][9][10][11] Where legislative terms have neither been defined by statute nor judicially interpreted, a court is guided by both the plain meaning of the statute and the legislative intent. (****1009***213***Harris Bank v. Village of Mettawa* (1993), 243 Ill.App.3d 103, 116, 183 Ill.Dec. 287, 611 N.E.2d 550.) The primary rule in statutory construction, to which all other rules are subordinate, is to determine and give effect to the true intent of the legislature. (*Graunke v. Elmhurst Chrysler Plymouth Volvo, Inc.* (1993), 247 Ill.App.3d 1015, 1020, 187 Ill.Dec. 401, 617 N.E.2d 858.) To determine legislative intent, statutory language is examined as a whole, and each part is considered in connection with every other part. (*Harris Bank*, 243 Ill.App.3d at 116, 183 Ill.Dec. 287, 611 N.E.2d 550.) Where the language is clear, it should be given effect without resorting to other aids for construction. *Graunke*, 247 Ill.App.3d at 1020, 187 Ill.Dec. 401, 617 N.E.2d 858.

[12] We agree with the trial court that the pertinent language of section 11 is clear on its face. It provides for a very limited exception to the strict licensing requirements of the Act only where the management executive recruiting firm is acting solely on behalf of, and is compensated solely by, an employer. This exception is limited to situations where the recruiting firm is retained by and acting solely on behalf of the hiring employer and not as an independent third party to negotiations between an applicant and one or more potential employers. The recruiting firm must also be compensated solely by the employer, thereby placing the employer in a position to safeguard itself from abuses by its chosen recruiter. If a recruiter were allowed to work for a group of employers with respect to a single applicant, this safeguard would be lost and problems of conflict of interest would arise.

Under the analysis urged by plaintiff, a recruiter could play employers against one another, driving up the price paid for the applicant and increasing the commission realized by the recruiting firm. The recruiter could also hold back the most qualified candidates in the "applicant pool" and disclose them to only the highest paying employers. These situations demonstrate how the recruiting firm lacks responsibility to any single employer. The obligation which exists when a recruiting firm is acting solely on behalf of, and is being compensated solely by, a single employer in a particular transaction provides the safeguard which vitiates the legislative concerns underlying the Act. Contrary to the conclusory statements in plaintiff's affidavits, the legislature has prohibited recovery of a fee by an unlicensed contingency search firm which operates merely to present job candidates to potential hiring companies on an opportunistic basis.

In the present case, the undisputed and well-pleaded facts establish***346** that there was no agency relationship between plaintiff and defendants. Plaintiff was circulating Schneidereit's resume to several employers other than defendants in the executive benefits consulting industry. In fact, plaintiff's own complaint, while alleging that there may have been a contract reached with defendants, stated that some form of "account" was created regarding a search for employment on behalf of Schneidereit at least four days earlier. It was also undisputed that defendants were contacted by plaintiff, not vice versa. Plaintiff did not deny these facts in its affidavits or complaint, but asserted that a contract was reached with defendants during communications on August 19, 1991, regardless of who had initiated the discussions. Because we determine, as did the trial court, that plaintiff was not acting solely on defendants' behalf, plaintiff did not qualify for the limited exception to the licensing requirements of the Act. Dismissal was, therefore, correctly granted under section 2-619 because any contract which may have existed between plaintiff and defendants was rendered void and unenforceable by the provisions of the Act.

It is our view that it would be inappropriate to allow custom and usage within the recruitment industry to define the terms of section 11. The Act was designed to correct and prevent abusive practices by employment agencies. (*T.E.C.*, 131 Ill.App.3d at 1096, 87 Ill.Dec. 220, 476 N.E.2d 1212.) It would be ill-advised, therefore, to allow the customs of the very industry the legislature sought to control to define or limit the regulatory legislation. We agree with the court in *T.E.C.* that strict adherence to the terms of the Act is necessary to prevent its protective measures from being thwarted. Although the present result of a strict and ****1010 ***214** literal application of the Act may be harsh, this harshness must be balanced against the need for uniformity of application in future cases. *T.E.C.*, 131 Ill.App.3d at 1096, 87 Ill.Dec. 220, 476 N.E.2d 1212.

We recognize that plaintiff contended that it did not initiate the contacts with defendants, did not have any kind of "account" with Schneidereit, did not work on behalf of anyone other than defendants, and argued that Atkinson knew of the job opening with defendants prior to his initial contact with Schneidereit. Some of these points, however, were presented only through arguments of counsel unsupported by specific statements by affidavit, while others were contrary to the plain language of plaintiff's complaint. Because the arguments were neither "well pleaded" nor supported by affidavit, they were unworthy of consideration by the trial court. See *Franzen-Peters*, 155 Ill.App.3d at 961, 108 Ill.Dec. 538, 508 N.E.2d 1115.

[13] The second question raised by plaintiff is whether the trial court erred in denying substituted counsel's motion for leave to file an ***347** amended motion for reconsideration with supporting exhibits. Plaintiff characterizes this question as analogous to the question of the filing of "tardy" pleadings under Supreme Court Rule 183. (134 Ill.2d R. 183.) Citing *McGrath Heating & Air Conditioning Co. v. Gustafson* (1976), 38 Ill.App.3d 465, 348 N.E.2d 223, plaintiff contends that it is error to deny a motion for late filing unless the opposing party can demonstrate prejudice.

Plaintiff mischaracterizes both the nature of the subject motion and the standard for granting a Rule 183 extension. Rule 183 provides that a court, "for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." (134 Ill.2d R. 183.) The record reflects that the trial court denied plaintiff's motion for rehearing or reconsideration or other relief nearly a month before the motion for leave to amend was filed by successor counsel. The motion should, therefore, have been characterized as a motion for leave to file a *second* motion for rehearing or reconsideration or other relief. Plaintiff provides this court with no authority that there is a right to be heard on such a motion.

[14][15] Also, the burden does not fall on the opposing party to show that a Rule 183 motion should not be granted. Rather, the movant must demonstrate that there is "good cause" for allowing the extension. (134 Ill.2d R. 183.) The grant or denial of a motion for extension falls within the sound discretion of the trial court. (*Olympic Federal v. Witney Development Co.* (1983), 113 Ill.App.3d 981, 988, 69 Ill.Dec. 684, 447 N.E.2d 1371.) Inadvertence, mistake, or absence of prejudice to the opposing party or inconvenience to the trial court does not constitute "good cause." *Greene v. City of Chicago* (1976), 48 Ill.App.3d 502, 513, 6 Ill.Dec. 696, 363 N.E.2d 378,*aff'd* (1978), 73 Ill.2d 100, 22 Ill.Dec. 507, 382 N.E.2d 1205.

The trial court acted correctly in striking plaintiff's successor counsel's amended motion filed prior to his entering an appearance. Defendants' motion to strike effectively placed plaintiff's counsel on notice of the problem, which counsel subsequently remedied by filing a motion for substitution of counsel. Despite plaintiff's counsel's ability to file a motion for leave to amend the pending motion prior to the hearing, thereby seeking to correct the problem of his premature filings, he took no such action. Thus, plaintiff's motion would not have been appropriately granted even if it had been properly brought under Rule 183.

The trial court correctly concluded that plaintiff's motion was neither procedurally nor substantively sound. We conclude that the trial court did not abuse its discretion in denying plaintiff's motion ***348** for leave to file an amended motion for rehearing or reconsideration or other relief.

Defendants have filed a motion pursuant to Supreme Court Rule 361 (134 Ill.2d R. 361) to strike portions of plaintiff's reply brief which purportedly raise matters neither pleaded nor argued in the trial court or in plaintiff's amended appellant brief. We agree with defendants that plaintiff raises ****1011 ***215** several points in its reply brief which are not properly before this court. We have previously identified the relevant facts which were well pleaded or supported by affidavit, and the issues raised by plaintiff are resolved solely upon those facts. It is unnecessary, therefore, to strike portions of the reply brief.

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

COLWELL and PECCARELLI, JJ., concur.
Ill.App. 2 Dist.,1994.
Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.
261 Ill.App.3d 338, 633 N.E.2d 1003, 199 Ill.Dec. 207

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TAB 8

Bloom v. Village of Buda
Ill.App. 3 Dist.,1986.

Appellate Court of Illinois,Third District.
Dora BLOOM, Plaintiff-Appellee,
v.
VILLAGE OF BUDA, Illinois, A Municipal Corporation; and Genevieve Ekloff, Mayor of the Village of Buda; and the Board of Trustees of the Village of Buda; Defendants,
andArvell Barnett and Barbara Barnett, Defendants-Appellants.
No. 3-86-0019.

July 31, 1986.

Property owner filed suit against village, its mayor and board of trustees, and couple asking for issuance of writ of mandamus to compel village to remove three trees from an alley abutting her property and compelling village to require couple not to park their vehicles in alley. Couple's motion to dismiss was granted. The Circuit Court, Bureau County, C. Howard Wampler, P.J., subsequently dismissed cause as to all parties. Couple's motion to tax attorney's fees and costs to plaintiff was denied, and they appealed. The Appellate Court, Heiple, J., held that: (1) couple were properly joined as defendants in action, and (2) plaintiff's allegations were true and made with reasonable cause and thus did not entitle defendants to award of costs and fees as victims of vexatious pleadings.

Affirmed.

West Headnotes

[1] Mandamus 250 151(1)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k150 Parties Defendant or Respondents
250k151 In General
250k151(1) k. In General. Most Cited Cases
Defendants were properly joined as private parties to action requesting writ of mandamus when their cooperation would have been necessary to effectuate writ which would have affected their right to park their cars in alley and required their cooperation in keeping their cars out of alley.

[2] Mandamus 250 154(4)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k154 Petition or Complaint, or Other Application
250k154(4) k. Right of Petitioner, and Authority, Duty, or Power of Respondent, in General. Most Cited Cases

Mandamus 250 190

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k190 k. Costs. Most Cited Cases
Allegations made by property owner in seeking writ of mandamus compelling village to remove three trees from an alley abutting her property and compelling village to require couple not to park their vehicles in alley, were insufficient, were true and made with reasonable cause, rendering award of fees and costs to defendants as victims of vexatious pleading inappropriate. S.H.A. ch. 110, ¶ 2-611.

****362 *958 ***787** Ann Burkey, Pierson, Maloney & Rayfield, Princeton, for defendants-appellants.
Fred Potter, Potter & Comba, Princeton, for plaintiff-appellee.

Justice HEIPLE delivered the Opinion of the Court.
The trial court denied the appellants', Arvell and Barbara Barnett's, section 2-611 motion for attorney fees from the plaintiff, Dora Bloom. (Ill.Rev.Stat.1985, ch. 110, par. 2-611.) The Barnetts appeal. We affirm.

On August 13, 1985, the plaintiff filed suit against the Village of Buda, its mayor and board of trustees, and the Barnetts. The plaintiff asked for issuance of a writ of mandamus compelling the village to remove three trees from an alley abutting her property and

compelling the village to require the Barnetts not to park their vehicles in the alley.

The Barnetts subsequently filed a motion to dismiss themselves as defendants. The trial court granted the motion on September 26, 1985. On October 10, 1985, the trial court dismissed the cause as to all parties.

The Barnetts then filed a motion to tax attorney fees and costs. In it, they alleged that "no conceivable set of facts and circumstances as alleged by the plaintiff could have resulted in any type of judgment, based upon the legal theory as propounded by the plaintiff." Accordingly, they requested that the trial court order the plaintiff to pay their attorney fees and costs under section 2-611 of the Code of Civil Procedure. (Ill.Rev.Stat.1985, ch. 110, par. 2-611.) The trial court denied the motion, finding that the plaintiff's allegations, though insufficient to maintain her action, were true and made with reasonable cause. The Barnetts brought the instant appeal.

The issue before us, albeit phrased in terms other than those used by the Barnetts, is whether the trial court improperly denied the Barnetts' motion for fees and costs. We find no impropriety.

[1] We first find that the plaintiff properly joined the defendants in her action. While a writ of mandamus will not issue against private individuals as such (*People v. Mattinger* (1904), 212 Ill. 530, 72 N.E. 906), it is proper to join private parties when their cooperation is necessary to effectuate the writ or when their legal interests may be collaterally determined. *People v. City of Casey* (3rd Dist., 1926), 241 Ill.App. 91; *People v. Reinhardt* (1961), 21 Ill.2d 153, 171 N.E.2d 660.

In the instant case, had the writ of mandamus issued, it ***959** would have affected the Barnetts' right to park their cars in the alley and required their cooperation in keeping their cars out of the alley. We find that they were therefore properly joined as defendants.

[2] We further find that the allegations made by the plaintiff in her complaint did not fall within the parameters of section 2-611's provision for awarding costs and fees to victims of vexatious pleadings. Ill.Rev.Stat.1985, ch. 110, par. 2-611.

Section 2-611 should not be construed to permit awarding attorney fees whenever a motion to dismiss is granted; the application of the paragraph is limited to cases where a party has abused its right to free access to the courts by pleading untrue statements of fact which the party knew or reasonably should have known were untrue. (See, *Third Establishment, Inc. v. 1931 North Park Apartments* (1st Dist., 1981), 93 Ill.App.3d 234, 48 Ill.Dec. 765, 417 N.E.2d 167.) Section 2-611 may be invoked only in cases falling strictly within the ****363 ***788** terms of its authorization. (*Tower Oil & Technology Co., Inc. v. Buckley* (1st Dist., 1981), 99 Ill.App.3d 637, 54 Ill.Dec. 843, 425 N.E.2d 1060.) Deciding whether to allow a motion for expenses under this paragraph is within the sound discretion of the trial court. The granting or denial of such penalties will not be overturned unless it can be shown that the court abused its discretion. *Pole Realty Co. v. Sorrells* (1981), 84 Ill.2d 178, 49 Ill.Dec. 283, 417 N.E.2d 1297.

The trial court herein stated that it was dismissing the plaintiff's cause of action because the complaint was missing the essential element of showing that the street was opened or improved by the city, or in long-time public use. The court also expressly found that an award of fees and costs was inappropriate in that while the plaintiff's allegations were insufficient, they were true and made with reasonable cause.

We have examined the record and find nothing which convinces us that the trial court abused its discretion.

Accordingly, we affirm the judgment of the circuit court of Bureau County.

Judgment affirmed.

SCOTT, P.J., and BARRY, J., concur.
Ill.App. 3 Dist.,1986.
Bloom v. Village of Buda
145 Ill.App.3d 957, 496 N.E.2d 361, 99 Ill.Dec. 786

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TAB 9

Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.
Ill.App. 4 Dist.,2002.

Appellate Court of Illinois,Fourth District.
Gary FORRESTER, Plaintiff-Appellant,
v.
SEVEN SEVENTEEN HB ST. LOUIS, REDEVELOPMENT CORPORATION, d/b/a "Adam's Mark, the Hotel of St. Louis," Defendant-Appellee.
No. 4-02-0278.

Argued Sept. 17, 2002.
Decided Dec. 16, 2002.

Hotel guest, who was an Illinois resident, sued Missouri hotel for damages guest's car allegedly suffered while it was parked overnight at hotel's parking lot. The Circuit Court, Champaign County, John R. Kennedy, J., granted the hotel's motion to quash service for lack of personal jurisdiction. Hotel guest appealed. The Appellate Court, Cook, J., held that hotel was not subject to personal jurisdiction in Illinois.

Affirmed.

West Headnotes

[1] Constitutional Law 92 3964

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 k. Non-Residents in General. Most Cited Cases
(Formerly 92k305(5))

Courts 106 12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases
Courts apply a two-step analysis when a party argues for jurisdiction under the long-arm statute by determining (1) whether jurisdiction is proper under the statute, and if so, (2) whether jurisdiction is permissible under the federal constitution's due process clause. U.S.C.A. Const.Amend. 14; S.H.A. 735 ILCS 5/2-209(a-c).

[2] Innkeepers 213 11(1)

213 Innkeepers
213k11 Loss of or Injury to Property of Guest
213k11(1) k. Nature and Extent of Liability in General. Most Cited Cases
The doctrine of "infra hospitium" is a common-law doctrine that imposes strict liability on innkeepers.

[3] Courts 106 12(2.15)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.15) k. Transacting or Doing Business. Most Cited Cases

Courts 106 12(2.30)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.30) k. Contract Cases. Most Cited Cases
The mere execution of a contract in Illinois is not by

itself a sufficient transaction of business to trigger the application of the long-arm statute; instead, courts consider who initiated the transaction, where the parties entered the contract, and where defendant would have performed the contract. S.H.A. 735 ILCS 5/2-209(a)(1).

[4] Courts 106 12(2.15)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.15) k. Transacting or Doing Business. Most Cited Cases

For purposes of determining whether a defendant transacted business within the state under the long-arm statute, the relevant inquiry is not whether the plaintiff partially performed the contract in Illinois, but whether the defendant performed any part of the contract in Illinois. S.H.A. 735 ILCS 5/2-209(a)(1).

[5] Courts 106 12(2.25)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases

By accepting reservation from Illinois resident who was in Illinois at time he placed telephone call to make reservation, Missouri hotel did not transact business in Illinois, and thus did not subject itself to personal jurisdiction in Illinois on that ground, in suit brought by resident for damages to his car incurred in hotel's parking lot; hotel was not required to do anything in Illinois. S.H.A. 735 ILCS 5/2-209(a)(1).

[6] Courts 106 12(2.1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.1) k. In General. Most Cited Cases

The mere making of a contract with a forum resident does not constitute a consent to jurisdiction for purposes of a state's long-arm statute. S.H.A. 735 ILCS 5/2-209(a)(7).

[7] Courts 106 12(2.25)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases

By accepting reservation from Illinois resident who was in Illinois at time he placed telephone call to make reservation, Missouri hotel did not make a contract substantially connected with Illinois, and thus did not subject itself to personal jurisdiction in Illinois on that ground in suit brought by resident for damages to his car incurred in hotel's parking lot; other than fact that resident from Illinois, everything about contract was connected to Missouri. S.H.A. 735 ILCS 5/2-209(a)(7).

[8] Judgment 228 185.2(9)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.2 Use of Affidavits
228k185.2(9) k. Effect of Failure to File Affidavit. Most Cited Cases

Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases

A court does not take as true unrebutted affidavits, or portions thereof, that do not comply with Supreme Court rule describing procedure for motions for summary judgment and involuntary dismissal. Sup.Ct.Rules, Rule 191(a).

[9] Appeal and Error 30 837(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(1) k. In General. Most Cited Cases
Appellate court was not required to consider allegations in plaintiff's affidavit, supplemental to its affidavit responding to defendant's objection to personal jurisdiction, that did not comply with supreme court rule describing procedure for motions for summary judgment and involuntary dismissal; papers attached to affidavit were not sworn or certified, affidavit consisted primarily of legal conclusions without supporting facts, and affidavit did not affirmatively show plaintiff could testify as to its contents. Sup.Ct.Rules, Rule 191(a).

[10] Constitutional Law 92 3965(5)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(5) k. Services and Service Providers. Most Cited Cases
(Formerly 92k305(5))

Courts 106 12(2.25)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases
Due process would be offended by court's exercise of personal jurisdiction in Illinois resident's suit for damages to automobile against Missouri hotel at which Illinois resident stayed as a guest; although hotel was advertised in Illinois, hotel was located in Missouri, and Illinois resident had to take affirmative act of traveling to Missouri to stay there. U.S.C.A. Const.Amend. 14; S.H.A. 735 ILCS 5/2-209(c).

[11] Constitutional Law 92 3965(5)

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(5) k. Services and Service Providers. Most Cited Cases
(Formerly 92k305(5))

Courts 106 12(2.25)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases
Due process would be offended by court's exercise of general jurisdiction over Missouri hotel in Illinois resident's suit for damages to automobile incurred while resident was a guest, though hotel allegedly operated website for making reservations over the Internet. U.S.C.A. Const.Amend. 14.

****835***281** Gary D. Forrester (argued), Phebus & Winkelmann, Urbana, for Gary Forrester.
Stephen M. O'Byrne (argued), Rawles, O'Byrne, Stanko & Kepley, P.C., Champaign, for Seven Seventeen HB St. Louis.

Justice COOK delivered the opinion of the court:
***575** Plaintiff, Gary Forrester, appeals *pro se* the January 22, 2002, order of the Champaign County circuit court quashing service on defendant and

dismissing plaintiff's small-claims complaint. We affirm.

I. BACKGROUND

According to plaintiff's small-claims complaint, plaintiff spent the night of October 6, 2001, at defendant hotel in downtown St. Louis. Plaintiff made the reservation for his stay over the phone by calling defendant from plaintiff's home in Illinois. Plaintiff guaranteed his reservation by giving defendant a credit card number.

On the night of October 6, 2001, plaintiff's car was damaged while it was parked in defendant's parking facility in St. Louis, Missouri. Defendant refused to accept liability or pay for any of the damage. Plaintiff filed suit to recover for the damages to his car in small-claims court in the Champaign County, Illinois, circuit court.

****836 ***282** On November 16, 2001, defendant responded by filing an objection to jurisdiction and motion to quash service. Attached was an affidavit of Timothy Tata, the general manager of the hotel. This affidavit stated that defendant was a Missouri corporation with its principal place of business located at Fourth and Chestnut Streets, in the City of St. Louis, Missouri. Defendant owns no property or real estate in Illinois, does not transact business in Illinois, has no registered agent in Illinois, has no Illinois telephone number, and has never sold insurance in Illinois.

On November 19, 2001, plaintiff filed an affidavit in response to defendant's objection to jurisdiction and motion to quash service. This affidavit generally restated the allegations in plaintiff's small-claims complaint: plaintiff called defendant to make a reservation from his home in Champaign, Illinois, and plaintiff provided defendant with his credit card number. Plaintiff's affidavit further concluded that he and defendant had entered into an Illinois contract.

On November 29, 2001, defendant filed a supplemental affidavit. This affidavit stated that defendant has a cancellation policy and that ***576** it informs all persons making reservations of this policy. A person who gives a credit card number when making a reservation can cancel the reservation without consequence at any time prior to 4 p.m. on the date of arrival. Charges are made on the guest's credit card pursuant to the telephone authorization only if the guest fails to appear on the arrival date and has not cancelled his or her reservation prior to 4 p.m. on the arrival date.

On December 3, 2001, plaintiff filed a supplemental affidavit. This affidavit concluded that, to plaintiff's knowledge and belief, defendant has transacted business in Illinois within the meaning of section 2-209 of the Illinois Code of Civil Procedure (long-arm statute) (735 ILCS 5/2-209 (West 2000)). Defendant also made a contract that was substantially connected with Illinois and was wholly performed on plaintiff's side in Illinois and performed in substantial part on defendant's side in Illinois within the meaning of the Illinois long-arm statute. The affidavit further stated plaintiff got defendant's toll-free telephone number from a website on the Internet; that reservations at defendant hotel can be made on the Internet; there is an "Adam's Mark Hotel" in Chicago, Illinois; and defendant advertises in Illinois.

On December 17, 2001, defendant filed a motion to strike plaintiff's supplemental affidavit in part. The trial court denied the motion to strike.

On January 22, 2002, the trial court ultimately granted defendant's motion to quash service. Plaintiff filed a motion to reconsider, which was denied. In March 2002, plaintiff then filed a motion to vacate the order denying the motion to reconsider; and in April 2002, the court denied it. Plaintiff appeals.

II. ANALYSIS

This case presents the question of whether the Illinois courts may exercise personal jurisdiction over defendant hotel, a Missouri corporation. The trial court did not hold an evidentiary hearing, but decided the issue on the pleadings; therefore, our review is *de novo*. *Stein v. Rio Parismina Lodge*, 296 Ill.App.3d 520, 523, 231 Ill.Dec. 1, 695 N.E.2d 518, 520-21 (1998).

[1] Plaintiff argues that Illinois courts can exercise personal jurisdiction over defendant pursuant to the long-arm statute, specifically sections 2-209(a), (b), and (c) of the Code of Civil Procedure. 735 ILCS 5/2-209(a), (b), (c) (West 2000). Courts apply a two-step analysis when a plaintiff ****837 ***283** argues

for jurisdiction under the long-arm statute: (1) determine whether jurisdiction is proper under the statute; and if so, (2) determine if jurisdiction is permissible under the federal constitution's due process clause. ***577***Stein*, 296 Ill.App.3d at 524, 231 Ill.Dec. 1, 695 N.E.2d at 521. The analysis may begin with either step: if jurisdiction is not found under the long-arm statute, then there is no need to determine whether jurisdiction is constitutionally permissible; and if exercising jurisdiction would offend due process, then there is no need to address the application of the long-arm statute. *Stein*, 296 Ill.App.3d at 524, 231 Ill.Dec. 1, 695 N.E.2d at 521.

The long-arm statute provides in pertinent part:

"(a) Any person, whether or not a citizen or resident of this [s]tate, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and[,] if an individual, his or her personal representative, to the jurisdiction of the courts of this [s]tate as to any cause of action arising from the doing of such acts:

(1) [t]he transaction of any business within this [s]tate;

* * *

(7) [t]he making or performance of any contract or promise substantially connected with this State.

* * *

(b) A court may exercise jurisdiction in any action arising within or without this State against any person who:

* * *

(4) [i]s a natural person or corporation doing business within this State.

(c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-209 (West 2000).

Defendant also argues that the trial court erred in denying his motion to reconsider. We address each argument in turn.

A. Specific Jurisdiction under Section 2-209(a)

[2] Section 2-209(a) of the long-arm statute gives Illinois courts personal jurisdiction over an out-of-state defendant when that defendant commits one of the acts enumerated in the statute. This jurisdiction is specific and limited to a cause of action that arises directly from the commission of one of these enumerated acts. 735 ILCS 5/2-209(a) (West 2000). Plaintiff claims that defendant has committed the following acts enumerated in section 2-209(a): "[t]he transaction of any business within this [s]tate" (735 ILCS 5/2-209(a)(1) (West 2000)), and "[t]he making or performance of any contract or promise substantially connected with this [s]tate" (735 ILCS 5/2-209(a)(7) (West 2000)). Specifically, plaintiff argues that when he called defendant to make a reservation for a hotel room, defendant was transacting business in Illinois (section 2-209(a)(1)), and defendant was making or performing a contract substantially connected***578** to Illinois (section 2-209(a)(7)). Plaintiff further argues that his cause of action arises directly out of the alleged Illinois contract between him and defendant under the doctrine of *infra hospitium*. *Infra hospitium* is a common-law doctrine that imposes strict liability on innkeepers. See *Plant v. Howard Johnson's Motor Lodge*, 500 N.E.2d 1271 (Ind.App.1986). Therefore, plaintiff argues, because defendant committed these enumerated acts in Illinois, and plaintiff's cause of action arises directly from defendant's actions in Illinois, the Champaign County circuit court can exercise****838 ***284** personal jurisdiction over defendant in this case.

[3][4][5] We first address plaintiff's argument that defendant transacted business within this state when plaintiff called to make a reservation (section 2-209(a)(1)). According to plaintiff, this created an Illinois contract. Assuming there was a contract, and it was executed in Illinois, "the mere execution of a contract in Illinois is not by itself a sufficient transaction of business to trigger the application of the long-arm statute." *Khan v. Van Remmen, Inc.*, 325 Ill.App.3d 49, 58, 258 Ill.Dec. 628, 756 N.E.2d 902, 911 (2001). Instead, the courts consider who initiated the transaction, where the parties entered the contract, and where defendant would have performed the contract. *Campbell v. Mills*, 262 Ill.App.3d 624,

628, 199 Ill.Dec. 441, 634 N.E.2d 41, 44 (1994). "The relevant inquiry is not whether the *plaintiff* partially performed the contract in Illinois, but whether the *defendant* performed any part of the contract in Illinois." (Emphases in original.) *Khan*, 325 Ill.App.3d at 58, 258 Ill.Dec. 628, 756 N.E.2d at 911. In this case, plaintiff initiated the transaction by calling defendant hotel to make a reservation, and defendant's performance of the contract, which was to provide plaintiff with lodging, was to occur exclusively in Missouri. As defendant was not required to do anything in Illinois, there is no jurisdiction on this basis.

[6][7] We next address plaintiff's argument that defendant made a contract substantially connected with Illinois when plaintiff called defendant hotel to make a reservation (section 2-209(a)(7)). Assuming a contract was made over the phone, the contract was not substantially connected with Illinois. This was an alleged contract to provide lodging in St. Louis, Missouri. Plaintiff chose to travel to Missouri. Defendant was not required to do anything at all in Illinois. Other than the fact that plaintiff was from Illinois, everything about this contract connected to Missouri. "The mere making of a contract with a forum resident does not constitute a consent to jurisdiction." *Buxton v. Wyland Galleries Hawaii*, 275 Ill.App.3d 980, 983, 212 Ill.Dec. 507, 657 N.E.2d 708, 710 (1995), citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528, 545 (1985). There is no jurisdiction on this basis.

***579** B. General Jurisdiction Under Section 2-209(b)(4)

Section 2-209(b)(4) of the long-arm statute gives Illinois courts personal jurisdiction over an out-of-state defendant who is "doing business within this [s]tate." This jurisdiction is general and may be exercised in any cause of action arising anywhere against the defendant. 735 ILCS 5/2-209(b)(4) (West 2000).

We initially note that a hotel is in the business of providing lodging. Defendant hotel, located in St. Louis, Missouri, has never provided lodging in Illinois. Nor has plaintiff alleged that defendant sent any goods into Illinois. In short, we do not believe that defendant hotel is "doing business" in Illinois. However, plaintiff argues that defendant is doing business in Illinois because there is a website through which people can make reservations with defendant; there is an Adam's Mark hotel in Chicago, Illinois; there is an Illinois toll-free telephone number, Illinois advertising in the "yellow pages," and other Illinois advertising; and because of the contract with plaintiff.

[8] The allegations about the Adam's Mark hotel in Chicago, the website, and the Illinois advertising appear in plaintiff's supplemental affidavit. Defendant did not file any affidavits rebutting plaintiff's allegations..****839 ***285** Therefore, plaintiff argues, we must accept his averments as true. See *Professional Group Travel, Ltd. v. Professional Seminar Consultants, Inc.*, 136 Ill.App.3d 1084, 1089, 91 Ill.Dec. 656, 483 N.E.2d 1291, 1295 (1985) (where well-alleged facts in an affidavit are not contradicted by a counteraffidavit, they must be taken as true). "However, we do not take as true affidavits or portions thereof that do not meet the requirements of Supreme Court Rule 191(a) (145Ill.2dR. 191(a))." *Khan*, 325 Ill.App.3d at 56, 258 Ill.Dec. 628, 756 N.E.2d at 909.

Rule 191(a) provides in pertinent part:

"[A]ffidavits submitted in connection with a special appearance to contest jurisdiction over the person, as provided by section 2-301(b) of the Code of Civil Procedure, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." 145 Ill.2d R. 191(a) (as worded effective until July 1, 2002).

[9] Plaintiff's supplemental affidavit did not comply with Rule 191(a). The attached papers were not sworn or certified, the affidavit primarily consisted of legal conclusions without supporting facts, and the affidavit did not affirmatively show that plaintiff could testify as to its ***580** contents. Plaintiff suggests that the shortcomings should be overlooked because the trial judge did not tell the parties to follow the rules. Plaintiff also points out that the trial court

denied defendant's motion to strike plaintiff's supplemental affidavit.

We are not persuaded by these justifications. Plaintiff provides no authority for his suggestion that Rule 191(a) did not have to be followed in this case. We therefore are not obligated to consider plaintiff's averments about defendant hotel doing business in Illinois by operating a website and by the existence of an "Adam's Mark Hotel" in Chicago, Illinois. However, even if the allegations in plaintiff's supplemental affidavit demonstrated that defendant was doing business in Illinois, we would still decline to exercise jurisdiction over defendant, because, as discussed below, such exercise would offend constitutional due process protections.

C. Jurisdiction to the Extent Permitted by the Illinois and Federal Constitutions

Section 2-209(c) allows a court to exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS 5/2-209(c) (West 2000). Federal constitutional due process protection requires that a nonresident defendant have certain minimum contacts with the forum state such that maintenance of the suit there does not offend " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940). The following criteria are looked at in determining whether due process will be satisfied: (1) whether the nonresident defendant had "minimum contacts" with the forum state such that it had "fair warning" that it might be required to defend itself there; (2) whether the action arose out of or relates to the defendant's contacts with the forum; and (3) whether it is reasonable to require defendant to litigate in the forum state. ****840***286***Burger King Corp.*, 471 U.S. at 471-78, 105 S.Ct. at 2181-85, 85 L.Ed.2d at 540-44. The Supreme Court of Illinois has also stated that under the Illinois Constitution's due process guarantee jurisdiction may only be exercised if it is:

"fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood*, 141 Ill.2d 244, 275, 152 Ill.Dec. 384, 565 N.E.2d 1302, 1316 (1990).

In *Pilipauskas v. Yakel*, 258 Ill.App.3d 47, 196 Ill.Dec. 188, 629 N.E.2d 733 (1994), the defendants, owners of a lodge in Michigan, distributed brochures ***581** in Illinois through a marketing association, made approximately 100 calls to Illinois each year, almost half their guests came from Illinois, and when plaintiffs called defendant, defendant mailed them promotional materials. The court found that exercising jurisdiction over defendants would offend due process. *Pilipauskas*, 258 Ill.App.3d at 59, 196 Ill.Dec. 188, 629 N.E.2d at 741.

In *Excel Energy Co. v. Pittman*, 239 Ill.App.3d 160, 179 Ill.Dec. 805, 606 N.E.2d 637 (1992), the plaintiffs found an advertisement for equipment sold by defendant in a national magazine, contacted defendant about buying the equipment, and then traveled to Oklahoma to purchase the equipment. The court found that exercising jurisdiction over defendants would offend due process. *Excel Energy*, 239 Ill.App.3d at 164, 179 Ill.Dec. 805, 606 N.E.2d at 640.

[10] In this case, defendant advertises in Illinois, people from Illinois contact defendant, and people from Illinois choose to travel to Missouri to utilize defendant's services. Defendant in this case has not done anything more than defendants in *Pilipauskas*, *Excel Energy*, or any of a number of other cases where the courts have found that Illinois could not exercise jurisdiction over out-of-state hotels or lodges just because they advertised in Illinois and had clients from Illinois. See, *e.g.*, *Radosta v. Devil's Head Ski Lodge*, 172 Ill.App.3d 289, 122 Ill.Dec. 302, 526 N.E.2d 561 (1988); *Kadala v. Cunard Lines, Ltd.*, 226 Ill.App.3d 302, 168 Ill.Dec. 402, 589 N.E.2d 802 (1992); *Stein*, 296 Ill.App.3d 520, 231 Ill.Dec. 1, 695 N.E.2d 518.

All that defendant has done in this case is to advertise in Illinois and make a contract with an Illinois resident. Plaintiff chose to contact defendant, and plaintiff chose to travel to Missouri. Considering the quality and nature of defendant's acts that occur in Illinois, which are merely advertising, and that defendant's business of providing lodging in Missouri does not affect any interests in Illinois, we find

exercising jurisdiction over defendant would be not fair, just, or reasonable.

[11] We finally note that plaintiff has tried very hard to turn this into an "Internet" case. It is alleged that a website exists that allows persons to make reservations at defendant hotel over the Internet. Plaintiff argues that "defendant's [I]nternet activities alone * * * are a sufficient basis for general jurisdiction." We disagree. Via its website, defendant hotel allegedly advertises its services and provides a means for customers to contact defendant to make reservations. We do not see how this is qualitatively any different than an ad in any other medium that provides a phone number or other means to contact defendant hotel to make reservations. See, *e.g.*, *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F.Supp.2d 1082, 1088 (E.D.Mo.2001) (a website that allows persons to make reservations at a hotel over the Internet "is not unlike a toll-free reservations hotline").

****841 ***287 *582** D. Motion to Reconsider

Plaintiff's argument that the trial court erred in denying the motion to reconsider and motion to vacate the order denying the motion to reconsider is based on the premise that plaintiff had made a *prima facie* showing for exercising jurisdiction over defendant. Defendant had not filed any counteraffidavits, and therefore, according to plaintiff, the trial court should have either denied the motion to quash or conducted an evidentiary hearing. However, as we held above, we do not believe that plaintiff did make a *prima facie* showing for exercising jurisdiction over defendant, and even if plaintiff did, exercising jurisdiction over defendant would offend constitutional due process protections. We therefore affirm.

III. CONCLUSION

We affirm the trial court's judgment.

Affirmed.

KNECHT and STEIGMANN, JJ., concur.
Ill.App. 4 Dist.,2002.
Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.

336 Ill.App.3d 572, 784 N.E.2d 834, 271 Ill.Dec. 280

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TAB 10

C In re Marriage of Hartney
Ill.App. 2 Dist.,2005.

Appellate Court of Illinois,Second District.
In re MARRIAGE OF Karen L. HARTNEY,
Petitioner-Appellant,
andJeff Hartney, Respondent-Appellee.
No. 2-05-0039.

March 22, 2005.

Background: Wife filed petition for preliminary injunction to prevent husband from transferring alleged marital assets. The Circuit Court, Du Page County, James J. Konetski, P.J., dismissed petition. Wife appealed.

Holdings: The Appellate Court, McLaren, J., held that;
(1) fact that wife's petition for preliminary injunction to prevent husband from transferring alleged marital assets was disallowed by an order dismissing petition, rather than an order denying petition, did not divest Appellate Court of jurisdiction;
(2) wife showed a clearly ascertainable right in need of protection, as required for preliminary injunction;
(3) wife alleged she would suffer irreparable harm without protection of preliminary injunction;
(4) wife alleged no adequate remedy at law for husband's alleged dissipation of marital assets, as required for preliminary injunction; and
(5) trial court should have held evidentiary hearing on wife's petition for preliminary injunction.

Reversed and remanded.

West Headnotes

[1] Divorce 134 177

134 Divorce
134IV Proceedings
134IV(O) Appeal
134k177 k. Decisions Reviewable. Most Cited Cases

Fact that wife's petition for preliminary injunction to prevent husband from transferring alleged marital assets was disallowed by an order dismissing petition, rather than an order denying petition, did not divest Appellate Court of jurisdiction under rule allowing appeal from an order disallowing an injunction. Sup.Ct.Rules, Rule 307.

[2] Injunction 212 138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In General. Most Cited Cases
To grant preliminary injunctive relief, trial court must find that (1) plaintiff possesses a certain and clearly ascertainable right that needs protection; (2) plaintiff will suffer irreparable harm without protection of injunction; (3) there is no adequate remedy at law; and (4) there is a substantial likelihood that plaintiff will succeed on merits of case.

[3] Injunction 212 140

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k140 k. Form and Requisites of Application in General. Most Cited Cases
A complaint for a preliminary injunction must plead facts that clearly establish a right to injunctive relief.

[4] Divorce 134 87

134 Divorce
134IV Proceedings
134IV(H) Incidental Proceedings
134k87 k. Injunction Against Interference with Person or Property. Most Cited Cases
Wife showed a clearly ascertainable right in need of protection, as required for preliminary injunction to preserve status quo of marital estate during pendency

of dissolution, where she alleged husband sold $165,000 of marital assets, namely bonds, and transferred proceeds out of a marital account for his personal use and that husband threatened to remove more marital assets from marital accounts. S.H.A. 750 ILCS 5/501.

[5] Divorce 134 87

134 Divorce
134IV Proceedings
134IV(H) Incidental Proceedings
134k87 k. Injunction Against Interference with Person or Property. Most Cited Cases
Wife alleged she would suffer irreparable harm without protection of preliminary injunction to preserve status quo of marital estate during pendency of dissolution of marriage by stating that husband had already sold bonds and transferred proceeds out of a marital account to an unknown location and he had told wife that he would transfer more marital assets out of martial accounts. S.H.A. 750 ILCS 5/501.

[6] Injunction 212 138.9

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.9 k. Adequacy of Remedy at Law. Most Cited Cases
For a legal remedy to preclude preliminary injunctive relief, the remedy must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.

[7] Divorce 134 87

134 Divorce
134IV Proceedings
134IV(H) Incidental Proceedings
134k87 k. Injunction Against Interference with Person or Property. Most Cited Cases
Wife alleged no adequate remedy at law for husband's alleged dissipation of marital assets, as required for preliminary injunction to preserve status quo of marital estate during pendency of dissolution of marriage; allowing husband to sell marital assets and remove them from marital accounts, thus requiring wife to seek money damages after marital estate's value plummeted, was not the most practical and efficient remedy. S.H.A. 750 ILCS 5/501.

[8] Injunction 212 138.9

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.9 k. Adequacy of Remedy at Law. Most Cited Cases
A legal remedy is inadequate, and preliminary injunctive relief is warranted, where damages are difficult to calculate at time of hearing.

[9] Divorce 134 87

134 Divorce
134IV Proceedings
134IV(H) Incidental Proceedings
134k87 k. Injunction Against Interference with Person or Property. Most Cited Cases
Trial court should have held evidentiary hearing on wife's petition for preliminary injunction to preserve status quo of marital estate during pendency of dissolution of marriage, as it was unknown how husband's actions would affect marital estate. S.H.A. 750 ILCS 5/501.

****761 ***173 *1088** Margaret A. Bennett, Anne V. Swanson, Law Offices of Margaret A. Bennett, P.C., Oak Brook, for Karen L. Hartney.
***1089** Eva W. Tameling, Tameling & Associates, P.C., Oak Brook, for Jeff Hartney.

Justice McLAREN delivered the opinion of the court:
Petitioner, Karen Hartney, appeals the trial court's dismissal of her amended petition for a preliminary injunction enjoining respondent, Jeff Hartney, from transferring alleged marital assets. We reverse and remand.

[1] Initially, we address Jeff's argument that we do not have jurisdiction of this case because the order dismissing Karen's petition for a preliminary injunction is not final and appealable. This court has jurisdiction to review nonfinal interlocutory orders pursuant to Supreme Court Rule 307(a)(1). 166 Ill.2d

R. 307(a)(1). Rule 307(a)(1) allows an appeal from an order "disallowing" an injunction. Further, we disagree with Jeff that Rule 307(a)(1) does not apply here because the order at issue granted a motion to dismiss. The fact that Karen's petition for an injunction was disallowed by an order dismissing the petition rather than an order denying the petition does not divest this court of jurisdiction. See *In re Marriage of Centioli*, 335 Ill.App.3d 650, 653, 269 Ill.Dec. 814, 781 N.E.2d 611 (2002) (the court stated that it had jurisdiction to review an order granting a motion to dismiss a petition seeking a preliminary injunction). We also note that although Karen's amended petition was for a temporary restraining order and a preliminary injunction, she appeals only the trial court's order dismissing her petition for a preliminary injunction.

[2][3] On appeal, Karen argues that the trial court erred by dismissing her amended petition for a preliminary injunction. Section 501(a)(2)(i) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/501(a)(2)(i) (West 2002)) states that a party may seek a preliminary injunction to preserve the status quo of the marital estate during the pendency of the proceedings. To grant preliminary relief, the trial court must find that (1) the plaintiff possesses a certain and clearly ascertainable right that needs protection; (2) the plaintiff will suffer irreparable harm without the protection of the injunction; (3) there is no adequate remedy at law; and (4) there is a substantial likelihood that the plaintiff will succeed on the merits of the case. *In re Marriage of Schmitt*, 321 Ill.App.3d 360, 371, 254 Ill.Dec. 484, 747 N.E.2d 524 (2001). A complaint for a preliminary injunction must plead facts that clearly establish a right to injunctive relief. *Schmitt*, 321 Ill.App.3d at 371, 254 Ill.Dec. 484, 747 N.E.2d 524.

[4] First, we consider whether Karen has shown a clearly ascertainable right in ****762 ***174** need of protection. Karen's petition alleged that Jeff sold $165,000 of marital assets, namely bonds, and transferred the proceeds out of a marital account for his personal use. Karen further ***1090** alleged that Jeff threatened to remove more of the marital assets from the marital accounts. Karen has a right to claim assets from the marital estate as part of her marital property settlement. *Schmitt*, 321 Ill.App.3d at 371, 254 Ill.Dec. 484, 747 N.E.2d 524. Thus, Karen has sufficiently pleaded a clearly ascertainable right in need of protection.

[5] Karen has also alleged that she will suffer irreparable harm without the protection of the injunction. Karen stated in her affidavit that Jeff had already sold bonds and transferred the proceeds out of a marital account to an unknown location. Jeff also told Karen that he would transfer more marital assets out of the marital accounts. Karen sufficiently alleged that Jeff's actions posed a threat of dissipation, with Jeff having directed the liquidation of investments in the parties' accounts and the withdrawal of those funds. Thus, Karen sufficiently alleged irreparable harm. See *In re Marriage of Petersen*, 319 Ill.App.3d 325, 336-37, 253 Ill.Dec. 144, 744 N.E.2d 877 (2001).

[6][7] Karen has also adequately alleged that there is no adequate remedy at law. Jeff insists that Karen could obtain money damages and, thus, there is a legal remedy available. However, for a legal remedy to preclude injunctive relief, the remedy must be "clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *In re Marriage of Joerger*, 221 Ill.App.3d 400, 407, 163 Ill.Dec. 796, 581 N.E.2d 1219 (1991). Allowing Jeff to sell marital assets and remove them from marital accounts, thus requiring Karen to seek money damages after the marital estate's value plummets, is not the most practical and efficient remedy here. Karen has sufficiently pleaded that there is no adequate remedy at law, and the alleged potential loss of value in the marital estate makes injunctive relief proper.

[8][9] Jeff argues that Karen's petition for a preliminary injunction seeks to alter the status quo. We disagree. Courts have recognized the need to protect the status quo of financial assets in marital estates during the pendency of divorce proceedings. In *Petersen*, the Appellate Court, First District, affirmed a preliminary injunction enjoining a husband from withdrawing funds from the parties' retirement accounts. See *Petersen*, 319 Ill.App.3d at 337, 253 Ill.Dec. 144, 744 N.E.2d 877. The *Petersen* court reasoned that the status quo needed to be maintained to prevent the "dissipation or destruction of the property in question." *Petersen*, 319 Ill.App.3d at 337, 253 Ill.Dec. 144, 744 N.E.2d 877. A legal remedy is inadequate where damages are difficult to calculate at the time of hearing. *Joerger*,

221 Ill.App.3d at 406, 163 Ill.Dec. 796, 581 N.E.2d 1219. At this stage in the proceedings, how Jeff's actions would affect the marital estate is unknown. The status quo to be maintained by a preliminary injunction here is the prevention of dissipation or destruction of the property in question. Thus, the trial court erred by dismissing***1091** the petition without an evidentiary hearing. See *Petersen*, 319 Ill.App.3d at 336-37, 253 Ill.Dec. 144, 744 N.E.2d 877.

The judgment of the circuit court of Du Page County is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BOWMAN and BYRNE, JJ., concur.
Ill.App. 2 Dist.,2005.
In re Marriage of Hartney
355 Ill.App.3d 1088, 825 N.E.2d 759, 292 Ill.Dec. 171

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TAB 11

C Inland Real Estate Corp. v. Lyons Sav. & Loan
Ill.App. 2 Dist.,1987.

Appellate Court of Illinois,Second District.
INLAND REAL ESTATE CORPORATION, an Illinois corporation, Plaintiff-Appellant,
v.
LYONS SAVINGS & LOAN, an Illinois savings and loan corporation, Defendant-Appellee.
No. 2-86-0281.

March 31, 1987.

Borrower brought action alleging that lender had failed to comply with terms of loan commitment. Lender filed motion to dismiss. The 18th Circuit Court, DuPage County, Richard A. Lucas, J., dismissed the complaint after denying first motion to dismiss. Plaintiff appealed. The Appellate Court, Reinhard, J., held that: (1) it was within trial court's discretion to consider multiple motions for dismissal based upon certain defects or defenses and to permit filing of subsequent motions to dismiss beyond initial time for pleading; (2) defenses raised were not properly resolved by motion for involuntary dismissal based upon certain defects or defenses; and (3) even assuming that complaint imperfectly stated cause of action against lender, allegations did not wholly and absolutely fail to state any cause of action so as to warrant dismissal when objections were raised for first time on appeal.

Reversed and remanded.

West Headnotes

[1] Pretrial Procedure 307A 673

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak673 k. Time for Motion; Condition of Cause. Most Cited Cases

Pretrial Procedure 307A 675

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak675 k. Motion and Proceedings Thereon. Most Cited Cases
It was within trial court's discretion to consider multiple motions for dismissal based upon certain defects or defenses and to permit filing of subsequent motions to dismiss beyond initial time for pleading. S.H.A. ch. 110, ¶¶ 2-619, 2-619(a)(9).

[2] Pretrial Procedure 307A 531

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)1 In General
307Ak531 k. Nature and Scope of Remedy in General. Most Cited Cases
Purpose of motion for involuntary dismissal based upon certain defects or defenses is primarily that of avoiding means of obtaining at outset of case a summary disposition of issues of law or of easily proved issues of fact, with reservation of jury trial as to disputed questions of fact. S.H.A. ch. 110, ¶ 2-619.

[3] Pretrial Procedure 307A 561.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases
(Formerly 307Ak561)
Although affirmative defenses delineated in section governing involuntary dismissal based upon certain defects or defenses are not exclusive, where “affirmative matter” avoiding legal effect of or defeating claim is merely evidence upon which defendant expects to contest ultimate facts stated in complaint, sections should not be used. S.H.A. ch.

110, ¶¶ 2-619, 2-619(a)(9).

[4] Pretrial Procedure 307A 562

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak562 k. Particular Defenses. Most Cited Cases
Defenses that borrower failed to request funds within time period provided for in line of credit agreement, that borrower failed to comply with condition precedent of letter of commitment requiring borrower to submit acceptable appraisal, that borrower failed to timely forward necessary documents to lender to qualify for funding, that borrower failed to attach to its complaint the entire agreement and relevant acceptance and approval endorsement, and that letter of commitment attached to complaint omitted relevant language and raised factual issues attacking allegations of complaint based upon alleged failure to comply with terms of loan commitment, were not properly resolved by motion for involuntary dismissal based upon certain defects or defenses. S.H.A. ch. 110, ¶ 2-619.

[5] Pretrial Procedure 307A 643

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)5 Particular Actions or Subject Matter, Defects in Pleading
307Ak643 k. Contracts; Sales. Most Cited Cases
Even assuming that complaint alleging existence of line of credit agreement, lender's breach by refusing to fund loan request under contract, borrower's performance of all conditions, and existence of damages suffered at the result of lender's breach, imperfectly stated cause of action against lender, allegations did not wholly and absolutely fail to state any cause of action so as to warrant dismissal when objections were raised for first time on appeal. S.H.A. ch. 110, ¶¶ 2-612 note, 2-612(c), 2-615.

****653 *848 ***853** Wildman Harrold Allen & Dixon, Harry Golter, Robert S. Solomon, Chicago, for plaintiff-appellant.
***849** Guerard & Drenk, Ltd., Douglas Drenk, David Drenk, Wheaton, for defendant-appellee.

Justice REINHARD delivered the opinion of the court:
Plaintiff, Inland Real Estate Corporation, appeals from the dismissal of its complaint against defendant, Lyons Savings and Loan, an Illinois savings and loan corporation.

Plaintiff raises the following issues for review: (1) whether the trial court can properly consider additional motions to dismiss once it has denied a motion to dismiss, (2) whether the motions to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Ill.Rev.Stat.1985, ch. 110, par. 2-619) raise factual issues in defense which conflict with the well-pleaded facts in the ****654 ***854** complaint thereby precluding dismissal under a section 2-619 motion, and (3) whether an affidavit filed with one of the motions to dismiss was conclusory and should have been stricken.

Plaintiff's complaint alleges that in October 1983, plaintiff negotiated for a $3,750,000 line of credit by applying for a loan with two mortgage brokers, B.A. Mortgage Company of Chicago and G.H. Graff and Associates, Inc., that plaintiff agreed to pay each mortgage broker 1% of the amount of the line of credit if a loan commitment was obtained, and that plaintiff would pay the lender of such a loan an additional 1% of the commitment amount. It also alleges that defendant obtained plaintiff's application from these mortgage brokers and issued a commitment letter dated November 1, 1983. It further alleges that certain modifications were negotiated and incorporated into the commitment by a letter from defendant dated November 4, 1983, that plaintiff accepted the commitment on November 10, 1983, that defendant confirmed its acceptance on or about November 15, 1983, as indicated by a letter from one of the mortgage brokers attached to the complaint, and that plaintiff paid $37,500 to each mortgage broker and $37,500 to defendant for the issuance of the loan commitment. Both the commitment letter and the modifying letter were attached to the complaint. Plaintiff alleges that these two attachments constitute the entire agreement between the parties concerning the $3,750,000 commitment for a line of credit.

Plaintiff also alleges in the complaint that it drew $1,250,000 on the line of credit in May 1984, that several other requests for draws on the remainder of the line of credit were made by plaintiff but were rejected by defendant, that the commitment was to remain in full force for one year from the date of acceptance, November 10, 1983, ***850** that on October 22, 1984, plaintiff advised defendant that it was in need of a draw of $1,995,000 on the line of credit, that plaintiff, on November 9, 1984, provided defendant "with all documents and materials necessary and required to fund" the loan and performed "all things required to be performed pursuant to the commitment" to obtain the loan, and that defendant failed and refused to fund the loan. Plaintiff then alleges that defendant was unable to meet certain government regulations to be able to fund the entire $3,750,000 commitment, that defendant, knowing of its inability to fund the loan, did not inform plaintiff of this inability, that this failure to advise created a failure of consideration entitling plaintiff to a refund of the commitment fee paid, and that the defendant's failure to fund the latest draw request defeated the entire purpose of the total commitment damaging plaintiff in the amount of the commitment fee paid.

The letter of commitment purportedly issued by defendant on November 1, 1983, attached as "Exhibit A" to the complaint, indicates, in pertinent part, that defendant agreed to furnish a $3,750,000 line of credit to be used to fund second and third mortgages for plaintiff, that this line of credit would be available for 12 months from the date of acceptance, that plaintiff would pay a $37,500 fee for the 12-month term and an additional $37,000 fee for a once only 12-month extension of the time period if it chose, that each funding on the line of credit was subject to the submission of a MAI appraisal acceptable to defendant, and that this offer only was open until November 3, 1983. Plaintiff's acceptance of this commitment is purported to be indicated by a letter dated November 4, 1983, written to a mortgage company by defendant, attached as "Exhibit B" to the complaint, which included modifications to defendant's offer and an acknowledgement of the $37,500 commitment fee. "Exhibit C" to the complaint is purported to be an acknowledgement of the existence of the line of credit agreement.

Defendant filed a motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)(9)) contending that plaintiff was barred from recovery as it failed to request the funds within the time period provided for in the agreement. Specifically, the motion asserts that the line of credit agreement governing the transaction was entered****655 ***855** into on May 9, 1984, that this line of credit was available only until November 1, 1984, that the agreement required a 30-day notice prior to the request for funds, that plaintiff did not give the proper 30-day notice prior to the expiration of the credit period, and that the required documentation was not provided by plaintiff until after the time period had expired.***851** This motion was supported by the affidavit of William Hale. The affidavit asserted that Hale is the in-house counsel for defendant, and that the line of credit agreement, attached to the affidavit and dated May 9, 1984, embodied the terms and conditions of the line of credit established for plaintiff by defendant. The form of this agreement does not resemble the agreement attached to plaintiff's complaint.

The trial court granted plaintiff's motion to strike the Hale affidavit and allowed defendant 14 days to file an amended affidavit. The court also set the hearing date on defendant's motion to dismiss for June 3, 1985. On May 21, 1985, defendant filed the amended affidavit of Hale. It was alleged that the facts alleged therein were within his personal knowledge, and that the documents attached to the affidavit were business records of defendant kept in the ordinary course of business. Attached to this second Hale affidavit was, again, the "Line of Credit Agreement" along with seven other documents asserted to be business records of defendant which pertained to the credit agreement at issue between plaintiff and defendant.

On May 24, 1985, defendant filed a second section 2-619(a)(9) motion to dismiss contending that, as plaintiff failed to comply with a condition precedent of the letter of commitment requiring plaintiff to submit to defendant an acceptable MAI appraisal of the property for which the funds would be used, the complaint should be dismissed apparently because the agreement relied upon by plaintiff in the letter of commitment ceased to exist. Attached to this motion was the affidavit of Michael Maslanka, vice-president of the commercial real estate division with defendant

and defendant's chief real estate appraiser. Maslanka asserted in the affidavit that the MAI real estate appraisal submitted by plaintiff was rejected in October or November 1984 because the appraisal was premised on incorrect and improper information including the utilization of the wrong definition of "market value." Also attached was a portion of this appraisal and defendant's definition of "market value."

On the same day, defendant filed a third section 2-619(a) motion to dismiss. This third motion set forth three reasons for the dismissal of the complaint: the failure to attach the entire and relevant documents to the complaint; the omission of language in the letter of commitment attached to the complaint; and the failure to timely forward the necessary documents to defendant to qualify for the funding. No affidavit was attached to this motion although it referred to the documents attached to the Hale affidavit.

On June 3, 1985, plaintiff filed another motion to strike the second***852** Hale affidavit arguing that it was both conclusory and insufficiently supported with facts to serve as the foundation for submitting the exhibits attached to the affidavit. The trial court heard the arguments of the parties on plaintiff's motion to strike the Hale affidavit followed by arguments on defendant's second motion to dismiss the complaint for failing to comply with a condition precedent of the agreement. Plaintiff appeared to object to proceeding on this motion as it was not the first motion to dismiss filed, but proceeded anyway. The court denied the motion to strike the affidavit and granted defendant's motion to dismiss finding that plaintiff failed to comply with a condition precedent to the agreement.

On June 21, 1985, however, plaintiff filed a motion to vacate and reconsider the June 3 order. It argued that defendant should be estopped from asserting the alleged failure of the condition precedent because defendant accepted other nonconforming appraisals on other occasions and because defendant did not originally refuse to fund the loan for this reason. Attached to this motion was the affidavit of Raymond Petersen, a vice-president with plaintiff, who ****656 ***856** asserted that he arranges the financing for plaintiff, that defendant never notified him that the appraisal was unsatisfactory, and that the letter received rejecting plaintiff's funding request, also attached to the affidavit, did not state that the reason was an unacceptable MAI appraisal but specified three other reasons.

After the submission of memoranda and the presentation of arguments on this motion on September 5, 1985, the trial court vacated its June 3 order, denied defendant's second motion to dismiss, and continued the motion to strike the Hale affidavit for further consideration. Plaintiff then filed responses to the remainder of defendant's motions in which it argued that defendant waived consideration of the two remaining motions to dismiss by proceeding on one, that the remaining motions are contradictory and are based on insufficient information, and that the Hale affidavit should be dismissed. Thereafter, on February 10, 1986, although no transcript of a hearing was made part of this record, the trial court dismissed plaintiff's complaint with prejudice without specifying which motion was granted. Plaintiff's subsequent motion requesting the trial court to state which of the two motions to dismiss was granted on February 10 was denied.

We initially consider plaintiff's contention, presented without citation of authority, that it was improper for the trial court to consider defendant's remaining section 2-619 motions to dismiss once it had denied one of defendant's section 2-619 motions to dismiss. Defendant further argues that the second and third motions to dismiss were filed ***853** without leave of court, that these two motions were filed beyond the time for pleading, and that none of the motions were consolidated.

[1] Section 2-620 of the Code of Civil Procedure provides that "[t]he form and contents of motions, notices regarding the same, hearings on motions, and all other matters of procedure relative thereto, shall be according to rules." (Ill.Rev.Stat.1985, ch. 110, par. 2-620.) The supreme court rules, however, do not specifically address all the objections plaintiff raises to the procedure followed below. When a motion is filed within the time for pleadings, Supreme Court Rule 181(a) does provide, however, that "another appropriate motion" shall be filed within the time the court directs in the order disposing of the motion. (87 Ill.2d R. 181(a).) As the Code of Civil Procedure is to be liberally construed to speedily and finally reach an end to the

controversy according to the substantive rights of the parties (Ill.Rev.Stat.1985, ch. 110, par. 1-106), Rule 181(a) clearly demonstrates that additional motions to dismiss can be filed with the trial court. We believe that as the practice of filing of multiple section 2-619 motions to dismiss is not prohibited by the supreme court rules, it was within the trial court's discretion to consider multiple motions for dismissal and to permit the filing of subsequent motions to dismiss beyond the initial time for pleading. (See, *e.g.*, *Illinois Housing Development Authority v. Sjostrom & Sons, Inc.* (1982), 105 Ill.App.3d 247, 253-54, 61 Ill.Dec. 22, 433 N.E.2d 1350; *Rubinkam v. MacArthur* (1939), 302 Ill.App. 71, 79, 23 N.E.2d 348; *Municipal Employes Insurance Association v. Taylor* (1939), 300 Ill.App. 231, 236-37, 20 N.E.2d 835.) The other objections to the motion procedure utilized below are without merit, and, furthermore, plaintiff has not shown any prejudice resulting from the practice of presenting and ruling on defendant's motions. See *Illinois Housing Development Authority v. Sjostrom & Sons, Inc.* (1982), 105 Ill.App.3d 247, 253, 61 Ill.Dec. 22, 433 N.E.2d 1350.

Next, we consider plaintiff's argument that all of defendant's section 2-619 motions to dismiss raise factual issues constituting defenses which conflict with well-pleaded facts in the complaint rather than raising affirmative matter, thereby precluding dismissal pursuant to a section 2-619 motion. Plaintiff further maintains that as the affirmative matters asserted in the two remaining motions to dismiss the complaint do not negate the alleged cause of action completely, the challenge presented in the motions is actually to the factual sufficiency of the complaint and cannot be brought pursuant to section 2-619.

****657 ***857** [2][3] The purpose of section 2-619 is primarily that of affording a ***854** means of obtaining at the outset of a case a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact. (See Ill.Ann.Stat., ch. 110, par. 2-619, Historical & Practice Notes, at 662 (Smith-Hurd 1983); see also *Dangeles v. Marcus* (1978), 57 Ill.App.3d 662, 667, 15 Ill.Dec. 299, 373 N.E.2d 645.) Subsection (a)(9) provides as a ground for dismissal "[t]hat the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Ill.Rev.Stat.1985, ch. 110, par. 2-619(a)(9).) Although the affirmative defenses delineated in section 2-619 are not exclusive, where the "affirmative matter" is merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint, section 2-619 should not be used. *Hayna v. Arby's, Inc.* (1981), 99 Ill.App.3d 700, 710, 55 Ill.Dec. 1, 425 N.E.2d 1174; *Connelly v. Estate of Dooley* (1981), 96 Ill.App.3d 1077, 1082, 52 Ill.Dec. 462, 422 N.E.2d 143; *Dangeles v. Marcus* (1978), 57 Ill.App.3d 662, 667, 15 Ill.Dec. 299, 373 N.E.2d 645.

[4] All three of defendant's section 2-619 motions to dismiss raised defenses to plaintiff's cause of action based on the pleadings and exhibits attached to the complaint showing the existence of a letter of commitment to fund a line of credit in return for a certain fee. Defendant's motions asserted defenses that plaintiff failed to request the funds within the time period provided for in the agreement, that plaintiff failed to comply with a condition precedent of the letter of commitment requiring plaintiff to submit an acceptable appraisal, that plaintiff failed to timely forward the necessary documents to defendant to qualify for funding, that plaintiff failed to attach to its complaint the entire agreement and relevant acceptance and approval endorsement, and that the letter of commitment attached to the complaint omits relevant language. These defenses raise factual issues attacking the allegations in the complaint which should not be resolved by a section 2-619 motion to dismiss.

Defendant contends for the first time on appeal that, although it never moved to dismiss the complaint pursuant to section 2-615 (Ill.Rev.Stat.1985, ch. 110, par. 2-615) below, the dismissal of plaintiff's complaint should be affirmed because plaintiff wholly failed to state a cause of action in its complaint. Defendant argues that the complaint is deficient in several respects and maintains that the sufficiency of a complaint which wholly and absolutely fails to state a cause of action may be raised for the first time on appeal.

[5] Section 2-612(c) provides that "[a]ll defects in pleadings, either in form or substance, not objected to in the trial court are waived." (Ill.Rev.Stat.1985, ch. 110, par. 2-612(c); see ***855***O'Brien v. Township High School District 214* (1980), 83 Ill.2d 462, 466, 47 Ill.Dec. 702, 415 N.E.2d 1015.) It has been

stated, however, that an exception to this waiver rule exists if it appears as a matter of law that a complaint wholly fails to state a cause of action. (See, *e.g.*, *Torres v. Divis* (1986), 144 Ill.App.3d 958, 967, 98 Ill.Dec. 900, 494 N.E.2d 1227; *People ex rel. Difanis v. Futia* (1978), 56 Ill.App.3d 920, 925, 15 Ill.Dec. 184, 373 N.E.2d 530; Ill.Ann.Stat., ch. 110, par. 2-612, Historical & Practice Notes, at 299 (Smith-Hurd 1983); see also *Lasko v. Meier* (1946), 394 Ill. 71, 73-75, 67 N.E.2d 162.) Even assuming the complaint here imperfectly states a cause of action, the allegations of the complaint do not wholly and absolutely fail to state any cause of action to warrant a dismissal when raised for the first time on appeal.

Plaintiff's complaint alleges the existence of the line of credit agreement and attaches the documents purported to represent the terms and conditions of the contract, defendant's breach by refusing to fund a loan request under the contract, plaintiff's performance of all its conditions including the fee payment and submission of the required documents, and the existence of damages suffered as a result of defendant's breach. A factual situation would appear to be presented in which plaintiff's refusal to fund a loan pursuant ****658 ***858** to a line of credit agreement was a breach of that agreement. Likewise, although plaintiff failed to set forth the specific governmental regulations defendant was alleged to not have complied with, this is merely a technical defect and not a defect in substance, which, if raised below, could have been corrected by an amended pleading. The reasonable inferences flowing from this complaint present a sufficient factual situation on which to base the cause of action, and any formal defects could have been corrected by an amended pleading. It does not appear that no set of facts could be proved under this pleading which would entitle plaintiff to the requested relief.

For the foregoing reasons, the judgment of the circuit court dismissing plaintiff's complaint is reversed, and the cause is remanded for further proceedings. In view of this disposition of the case, it is unnecessary to determine the further issue raised by plaintiff on appeal concerning the sufficiency of the second Hale affidavit filed with one of defendant's motions to dismiss.

REVERSED and REMANDED.

UNVERZAGT and INGLIS, JJ., concur.

Ill.App. 2 Dist.,1987.
Inland Real Estate Corp. v. Lyons Sav. & Loan
153 Ill.App.3d 848, 506 N.E.2d 652, 106 Ill.Dec. 852

END OF DOCUMENT

TAB 12

Lewis E. v. Spagnolo
Ill.,1999.

Supreme Court of Illinois.
LEWIS E. et al., Appellees,
v.
Joseph A. SPAGNOLO, Superintendent of Education, et al., Appellants.
No. 83382.

April 15, 1999.

Students in school district sued state superintendent of education, state board of education, school district board of education, and school district superintendent, seeking injunctive and declaratory relief pursuant to Federal and State Constitutions, state statutes, and state common law for deprivation of minimally safe and adequate education. The Circuit Court, St. Clair County, Richard A. Aguirre, J., dismissed complaint with prejudice, and students appealed. The Appellate Court affirmed in part and reversed in part and remanded case, 287 Ill.App.3d 822, 679 N.E.2d 831, 223 Ill.Dec. 380. Granting petition for leave to appeal filed by defendants, the Supreme Court, Bilandic, J., held that: (1) students could not maintain cause of action under education article of State Constitution based on allegation that defendants had failed to provide them a minimally adequate education; (2) Illinois compulsory education law was not such a restraint on students' liberty as to give rise to an affirmative duty under Federal Due Process Clause to provide a minimally safe and adequate education; (3) Federal Due Process Clause did not impose duty on officials to protect students from dangers arising from state of disrepair of school buildings; (4) Illinois Due Process Clause did not provide broader protections than federal clause in present context; (5) students could pursue mandamus action for alleged violations of School Code, but present complaint did not allege necessary elements for writ of mandamus; (6) students did not have implied private right of action for alleged violations of School Code; and (7) allegedly unsafe conditions did not provide basis for a common-law right of action.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed in part and reversed in part; cause remanded.

Freeman, C.J., filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases
Public school students could not state cause of action under education article of State Constitution based on allegation that state superintendent of education, state board of education, school district board of education, and school district superintendent had failed to provide them a minimally adequate education. S.H.A. Const. Art. 10, § 1.

[2] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases
Quality of public education is a legislative matter and is not justiciable. S.H.A. Const. Art. 10, § 1.

[3] Constitutional Law 92 3893

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in

General
92k3893 k. In General. Most Cited Cases
(Formerly 92k255(1))
Substantive component of federal Due Process Clause protects fundamental liberty interests against infringement by the government, regardless of the procedures provided. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 1076

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1074 Right to Education
92k1076 k. Fundamental Nature of Right. Most Cited Cases
(Formerly 92k85)
Education is not a fundamental right protected by the Federal Constitution.

[5] Constitutional Law 92 4110

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)4 Government Property, Facilities, and Funds
92k4109 Public Services
92k4110 k. In General. Most Cited Cases
(Formerly 92k253(1))
Federal Due Process Clause does not generally impose any affirmative obligation on the state to provide substantive services to its citizens, even if such services may be necessary to secure life, liberty, or property interests. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 1050

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1050 k. In General. Most Cited Cases
(Formerly 92k82(1))

Constitutional Law 92 1083

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1083 k. Governmental Duty to Protect Citizens. Most Cited Cases
(Formerly 92k82(6.1))
Federal Constitution is a charter of negative liberties; it tells the state to let people alone, but does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

[7] Constitutional Law 92 4211

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4211 k. Duty to Protect; Failure to Act. Most Cited Cases
(Formerly 92k278.5(5.1))

Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases
Illinois compulsory education law, mandating that children of a certain age attend school, was not such a restraint on children's liberty as to give rise to an affirmative duty, under Federal Due Process Clause, to provide a minimally safe and adequate education. U.S.C.A. Const.Amend. 14; S.H.A. 105 ILCS 5/26-1.

[8] Constitutional Law 92 4049

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4047 Duty to Protect; Failure to Act
92k4049 k. Custody or Restraint; Special Relationship. Most Cited Cases
(Formerly 92k255(2))

Constitutional Law 92 4820

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4820 k. In General. Most Cited Cases
(Formerly 92k272(2))
In order for state's deprivation of a person's liberty to trigger a duty to provide aid or services, such restraint must involve incarceration, institutionalization, or other similar restraint. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 4211

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4211 k. Duty to Protect; Failure to Act. Most Cited Cases
(Formerly 92k278.5(5.1))

Schools 345 73

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k73 k. Care, Maintenance, and Repairs. Most Cited Cases
Public school students could not maintain cause of action against public education officials premised on a theory that officials violated a duty under Federal Due Process Clause to protect them from dangers arising from state of disrepair of school buildings in district, where officials were not alleged to have taken affirmative action to place children in position of danger and then failed to protect them, but merely to have allowed dangerous conditions to develop or persist. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 4211

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4211 k. Duty to Protect; Failure to Act. Most Cited Cases
(Formerly 92k278.5(5.1))

Schools 345 73

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k73 k. Care, Maintenance, and Repairs. Most Cited Cases
Mere fact that some buildings in school district were in disrepair did not give rise to a substantive due process claim against public education officials by public school students residing in that district; such a claim was improper attempt to use Due Process Clause to supplant traditional tort law. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 3845

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3843 Relationship to Other Sources of Law
92k3845 k. Tort Law. Most Cited Cases
(Formerly 92k253(1))
Federal Due Process Clause does not transform every tort committed by a state actor into a constitutional violation. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 4211

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4211 k. Duty to Protect; Failure to Act. Most Cited Cases
(Formerly 92k278.5(5.1))

Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases
Determination that federal Due Process Clause imposed no duty on public education officials to provide students in particular district with a minimally safe and adequate education applied as well with respect to Illinois Due Process Clause, in absence of any arguments for construing state due process protections more broadly. U.S.C.A. Const.Amend. 14; S.H.A. Const. Art. 1, § 2.

[13] Constitutional Law 92 3847

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3847 k. Relationship to Other Constitutions. Most Cited Cases
(Formerly 92k251)
Illinois Supreme Court will construe scope of State Constitution's due process guarantee independently from federal due process protections. U.S.C.A. Const.Amend. 14; S.H.A. Const. Art. 1, § 2.

[14] Courts 106 97(5)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(5) k. Construction of Federal Constitution, Statutes, and Treaties. Most Cited Cases
(Formerly 92k251)
Federal precedent interpreting the federal Due Process Clause is useful as a guide in interpreting the Illinois provision. U.S.C.A. Const.Amend. 14; S.H.A. Const. Art. 1, § 2.

[15] Mandamus 250 79

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k79 k. Establishment, Maintenance, and Management of Schools. Most Cited Cases
Public school students residing in school district in which educational facilities were allegedly in disrepair could pursue action for mandamus to compel public education officials to comply with certain duties imposed by School Code, where violations of School Code were not alleged to have caused injuries so as to provide a basis for imposing tort liability. S.H.A. 105 ILCS 5/1-1 et seq.

[16] Mandamus 250 154(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k154 Petition or Complaint, or Other Application
250k154(2) k. Form, Requisites, and Sufficiency in General. Most Cited Cases
Complaint by students residing in particular school district against public education officials did not allege necessary elements for a writ of mandamus with respect to alleged violations of School Code; although complaint listed numerous allegedly unsafe conditions and cited sections of School Code that officials allegedly violated by providing "unsafe, educationally inadequate public schools," complaint needed to explain what duties the cited sections imposed on officials and how officials had violated those duties. S.H.A. ILCS 5/1-1 et seq.

[17] Mandamus 250 1

250 Mandamus
250I Nature and Grounds in General
250k1 k. Nature and Scope of Remedy in General. Most Cited Cases

Mandamus 250 72

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k72 k. Matters of Discretion. Most

Cited Cases
"Mandamus" is an extraordinary remedy to enforce, as a matter of right, the performance of official duties by a public officer where no exercise of discretion on his part is involved.

[18] Mandamus 250 10

250 Mandamus
250I Nature and Grounds in General
250k10 k. Nature and Existence of Rights to Be Protected or Enforced. Most Cited Cases

Mandamus 250 12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of Acts to Be Commanded. Most Cited Cases
Writ of mandamus will not be granted unless the plaintiff can show a clear, affirmative right to relief, a clear duty of the defendant to act, and clear authority in the defendant to comply with the writ.

[19] Mandamus 250 12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of Acts to Be Commanded. Most Cited Cases
Writ of mandamus will not lie when its effect is to substitute the court's judgment or discretion for that of the body which is commanded to act.

[20] Schools 345 73

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k73 k. Care, Maintenance, and Repairs. Most Cited Cases
Students residing in particular school district did not have an implied private right of action against public education officials for unsafe conditions in school facilities that allegedly violated School Code, where there was no allegation that alleged violations had proximately caused any injuries, and students merely sought to compel officials to fulfill their duties under School Code. S.H.A. ILCS 5/1-1 et seq.

[21] Schools 345 73

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k73 k. Care, Maintenance, and Repairs. Most Cited Cases
Students residing in particular school district could not maintain common-law premises liability action against public education officials for allegedly unsafe conditions at school facilities, where there was no allegation that any child had been injured as result of unsafe conditions.

[22] Injunction 212 118(1)

212 Injunction
212III Actions for Injunctions
212k116 Pleading
212k118 Bill, Complaint, or Petition
212k118(1) k. In General. Most Cited Cases
Allegations in complaint filed by public school students against education officials concerning numerous allegedly unsafe conditions at facilities in school district were not sufficient to warrant mandatory injunction, where complaint failed to specify which conditions were in such urgent need of repair as to make that extraordinary remedy appropriate.

[23] Injunction 212 5

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy
212k5 k. Mandatory Injunction. Most Cited Cases
Mandatory injunction is an extraordinary remedy which may be granted when a plaintiff establishes that his remedy at law is inadequate and that he will suffer irreparable harm without the injunctive relief.

[24] Injunction 212 5

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy

212k5 k. Mandatory Injunction. Most Cited Cases
Mandatory injunctions are not favored by the courts and are issued only when the plaintiff has established a clear right to relief and the court determines that the urgency of the situation necessitates such action.

****800*201***3** Deborah L. Ahlstrand,Chief Civil Appeals Division, Chicago, for Joseph A. Spagnolo.
Pearson C.J. Bush, East St. Louis, for East St. Louis School District No. 189 & Geraldine Jenkins.
David E. Lieberman, Sonnenschein, Nath & Rosenthal, Susan Wishnick, The Roger Baldwin Found. of the ACLU, Inc., Chicago, Thomas E. Kennedy, Alton, for Lewis E.
William A. Morgan, Board of Education of the City of Chicago, Chicago, for Amicus Curiae, Board of Education of the City of Chicago.
Richard J. O'Brien, Jr., Sidley & Austin, Chicago, for Amicus Curiae, NAACP.

Justice BILANDIC delivered the opinion of the court:
In this appeal, this court is once again asked to enter the arena of Illinois public school policy. A class of schoolchildren residing in East St. Louis School District 189 challenges the adequacy of the education being provided to them in District 189 schools. We now reaffirm our recent holding in *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 220 Ill.Dec. 166, 672 N.E.2d 1178 (1996), that questions relating to the quality of a public school education are for the legislature, not the courts, to decide.

The plaintiffs are a putative class of school-age children residing in East St. Louis School District 189 (the District), acting through their parents or guardians. The named plaintiffs are 11 children attending ****801 ***4** various elementary or secondary schools in the district. The defendants are the Illinois State Board of Education and Superintendent of Education Joseph Spagnolo (the State defendants), and the board of education of the East St. Louis School District 189 and Geraldine Jenkins, the superintendent of District 189 (the District defendants). ***202** The plaintiffs filed their class action complaint in the circuit court of St. Clair County on April 12, 1995.

The complaint alleges the existence of numerous deficiencies in District 189 schools. The complaint charges that the District defendants have, for decades, failed to maintain school buildings and grounds in a manner that protects the safety of District students, failed to provide rudimentary instructional equipment and qualified teachers, and "otherwise so mismanaged the affairs of the District that children are unsafe and cannot reasonably be expected to learn in District schools."

The complaint alleges that "most" of the District's 31 school buildings are in "wretched disrepair." The plaintiffs cite numerous examples of unsafe conditions in the schools which, they contend, are the result of the District defendants' neglect, including: fire hazards; chronic flooding; structural flaws, such as falling plaster and cracked walls and roofs; malfunctioning heating systems; unsanitary restrooms; rooms sealed-off due to the presence of asbestos; broken windows; burnt-out light bulbs; nonworking water fountains; the presence of cockroaches and rats; and cold, nonnutritious lunches in the cafeterias. These examples are alleged to have occurred in various schools at various times since 1989. The complaint further alleges that, due to the District defendants' failure to provide adequate security, violence in the schools is widespread. The complaint lists several examples of violence which have occurred in various schools.

The plaintiffs' complaint also charges that, because of the District defendants' neglect and mismanagement, the students in the District are provided with meager instructional equipment, unsupervised, disengaged, and uncertified teachers, and systemic staffing deficiencies which resulted in some classrooms being without teachers at times. The complaint also cites to high drop-out ***203** rates and low test scores among the students in the District and alleges that these poor outcomes are the result of the District defendants' failure to provide an adequate instructional program. Finally, the complaint charges the District defendants with reckless mismanagement of the District's financial affairs.

As to the State defendants, the plaintiffs' complaint alleges that they have failed to adequately intervene in the District defendants' administration of the District. The plaintiffs acknowledge that the State Board of Education appointed a financial oversight panel in 1994 to oversee the District's finances. The complaint alleges that the panel's authority is too

circumscribed to remedy problems of student safety and educational quality. The plaintiffs also allege that the State defendants have failed to enforce educational and safety standards in the District. Specifically, the complaint charges that the State defendants continue to formally recognize and otherwise accredit District schools that they know or should know are unreasonably dangerous and educationally inadequate.

The complaint charges that the State and District defendants have violated the plaintiffs' rights under the education article of the Illinois Constitution (Ill. Const.1970, art. X, § 1), the due process clauses of the United States and Illinois Constitutions (U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, § 2), and various provisions of the Illinois School Code (105 ILCS 5/1-1*et seq.* (West 1996)). In addition, the complaint alleges that the District defendants have violated common law duties owed to the plaintiffs.

The plaintiffs seek a declaratory judgment that they "have the right to a safe, adequate education under the Illinois and United States Constitutions, the School Code, and common law." The plaintiffs further seek an order requiring the defendants to submit and implement a plan ***204** assuring the provision of safe, adequate public schools and correcting the conditions outlined in the complaint. In the alternative, the plaintiffs request that the State Board be ordered to revoke recognition of District 189 and to direct the reassignmentof****802 ***5** District 189 pupils to other school districts. The plaintiffs also seek an order directing the defendants to provide the plaintiffs with supplemental educational services needed to compensate them for the inadequate education provided to them in the past.

The circuit court dismissed the plaintiffs' complaint with prejudice, pursuant to section 2-615 of Code of Civil Procedure (735 ILCS 5/2-615 (West 1996)). The plaintiffs appealed and the appellate court reversed in part and affirmed in part. The appellate court affirmed the dismissal of each of the plaintiff's claims. 287 Ill.App.3d 822, 223 Ill.Dec. 380, 679 N.E.2d 831. The appellate court, however, did so only on the ground that the plaintiffs had not pled sufficiently detailed facts stating the particular acts and omissions of the defendants that allegedly created the inadequate conditions in the schools. The court held that the plaintiffs could possibly plead facts sufficient to state a claim under each of these theories and remanded to allow the plaintiffs to amend their complaint.

We granted a petition for leave to appeal filed by the defendants. 166 Ill.2d R. 315. The plaintiffs are seeking cross-relief from the appellate court's holdings that they did not plead sufficiently detailed facts to avoid the dismissal, albeit without prejudice, of their claims.

ANALYSIS

I. Education Article

[1] We first address whether the plaintiffs may state a cause of action under the education article of our state constitution. Ill. Const.1970, art. X, § 1. ***205**Section 1 of article X of the Illinois Constitution of 1970 provides, in its entirety, as follows:

> "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.
>
> The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.
>
> The State has the primary responsibility for financing the system of public education." Ill. Const.1970, art. X, § 1.

[2] The plaintiffs argue that this article grants them the right to a "minimally adequate education," and that they may sue state and local officials directly under this article for deprivation of that right. They claim that schoolchildren who are denied the "basic components" of education, which they define as "teachers, textbooks, and reasonably safe school buildings," are denied a free public education in violation of this article. The defendants respond that, under this court's decision in *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 220 Ill.Dec. 166, 672 N.E.2d 1178 (1996), the quality of public education is a legislative matter and is not

justiciable.

We agree with the defendants that *Committee for Educational Rights* is dispositive of this issue. In that case, a group of plaintiffs consisting of school districts, local boards of education, students and parents brought an action to challenge the state statutory scheme governing the funding of public schools in Illinois. Among other claims, the plaintiffs asserted that the statutory scheme violated the education article of the Illinois Constitution because the system did not provide a "high quality" education, as required by that article, to students in poorer districts. In considering this claim, this court analyzed whether the quality of the public education system was subject to judicial review. We reasoned that ***206** we must determine "whether the quality of education is capable of or properly subject to measurement by the courts." *Committee for Educational Rights*, 174 Ill.2d at 24, 220 Ill.Dec. 166, 672 N.E.2d 1178.

This court in *Committee for Educational Rights* concluded that "questions relating to the quality of education are solely for the legislative branch to answer." *Committee for Educational Rights*, 174 Ill.2d at 24, 220 Ill.Dec. 166, 672 N.E.2d 1178. In reaching this conclusion, we first noted that the education article of the 1970 Constitution corresponded to section 1 of article VIII of the 1870 Constitution, which provided that " [t]he ****803 ***6** general assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." Ill. Const. 1870, art. VIII, § 1. Under that provision, decisions of this court had consistently held that questions relating to the efficiency and thoroughness of the school system were solely for the legislature to answer, and that the courts lacked the power to intrude. *Committee for Educational Rights*, 174 Ill.2d at 24-25, 220 Ill.Dec. 166, 672 N.E.2d 1178. Although the requirement that schools provide a "good common school education" was recognized to be a limitation on the legislature's power to enact public school laws, that limitation was not among those held generally capable of judicial enforcement. Rather, the only limitations which the courts could enforce were that the schools shall be free and open to all equally. *Committee for Educational Rights*, 174 Ill.2d at 25, 220 Ill.Dec. 166, 672 N.E.2d 1178, quoting *Fiedler v. Eckfeldt*, 335 Ill. 11, 23, 166 N.E. 504 (1929). The court in *Richards v. Raymond*, 92 Ill. 612 (1879), explained the reason for precluding judicial review of the question of what constitutes a "good common school education":

> "No definition of a common school is given or specified in the constitution, nor does that instrument declare what course of studies shall constitute a common school education. * * * The phrase, 'a common school education' is one not easily defined. One might say that a student instructed ***207** in reading, writing, geography, English grammar and arithmetic had received a common school education, while another who had more enlarged notions on the subject might insist that history, natural philosophy and algebra should be included. It would thus be almost impossible to find two persons who would in all respects agree in regard to what constituted a common school education." *Richards*, 92 Ill. at 617.

This court in *Committee for Educational Rights* proceeded to conclude that the education article of the 1970 Constitution did not alter the role of the courts in this arena. We reasoned that "[c]ourts are no more capable of defining 'high quality educational institutions and services' under our present constitution than they were able to define a 'good common school education' under the 1870 Constitution." *Committee for Educational Rights*, 174 Ill.2d at 27, 220 Ill.Dec. 166, 672 N.E.2d 1178. We explained that what constitutes a "high quality" education cannot be ascertained by any judicially discoverable or manageable standards and that the constitution provides no principled basis for a judicial definition of "high quality":

> "It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.
>
> To hold that the question of educational quality is subject to judicial determination would largely

> deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. * * * [A]n open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the state and their elected representatives." *Committee for Educational Rights*, 174 Ill.2d at 28-29, 220 Ill.Dec. 166, 672 N.E.2d 1178.

***208** This court accordingly held that, to the extent the plaintiffs' education article claim was based on "perceived deficiencies in the quality of education in public schools," the claim was properly dismissed. *Committee for Educational Rights*, 174 Ill.2d at 32, 220 Ill.Dec. 166, 672 N.E.2d 1178.

The defendants here argue that the decision in *Committee for Educational Rights* defeats the plaintiffs' attempt to state a claim under the education article. They contend that this court has unequivocally held that it is solely up to the legislature, not the courts, ****804 ***7** to decide whether an education being provided meets the quality requirements of the constitution. The plaintiffs assert, however, that *Committee for Educational Rights* is not dispositive here because that decision did not address a claim that children were being deprived of a "minimally adequate" education, as opposed to a "high quality" education. The plaintiffs claim that they do not challenge the quality of education in their district but, rather, the "virtual absence" of education in their district. According to the plaintiffs, the courts can and must decide whether students in a particular district are being provided with the "rudimental elements" of education, which the plaintiffs define as "certified teachers, basic instructional materials, and reasonably safe school buildings."

We find the plaintiffs' attempt to distinguish the holding in *Committee for Educational Rights* unpersuasive. That decision did not limit itself to whether the courts could define a "high quality" education but, rather, considered the broadly stated issue of "whether the *quality of education* is capable of or properly subject to measurement by the courts." (Emphasis added.) *Committee for Educational Rights*, 174 Ill.2d at 24, 220 Ill.Dec. 166, 672 N.E.2d 1178. This court concluded that "questions relating to the *quality of education* are solely for the legislative branch to answer." (Emphasis added.) *Committee for Educational Rights*, 174 Ill.2d at 24, 220 Ill.Dec. 166, 672 N.E.2d 1178. ***209** In fact, we defined the claim raised by the plaintiffs as whether poor school districts provide a " normatively inadequate education." *Committee for Educational Rights*, 174 Ill.2d at 11, 220 Ill.Dec. 166, 672 N.E.2d 1178. Attempting to distinguish " high quality" from "minimally adequate" in this context is nothing more than semantics. No matter how the question is framed, recognition of the plaintiffs' cause of action under the education article would require the judiciary to ascertain from the constitution alone the content of an "adequate" education. The courts would be called upon to define what minimal standards of education are required by the constitution, under what conditions a classroom, school, or district falls below these minimums so as to constitute a "virtual absence of education," and what remedy should be imposed. Our decision in *Committee for Educational Rights* made clear that these determinations are for the legislature, not the courts, to decide.

The plaintiffs nonetheless argue that judicial review in this case is permitted under the so-called "boundary cases" such as *People ex rel. Leighty v. Young*, 309 Ill. 27, 139 N.E. 894 (1923). In *Committee for Educational Rights*, we noted that a "limited exception" to the principle that the courts will not generally decide questions of the thoroughness and efficiency of school systems had been recognized for matters relating to school district boundaries. *Committee for Educational Rights*, 174 Ill.2d at 16, 220 Ill.Dec. 166, 672 N.E.2d 1178. Under this exception, courts have declared invalid school districts that were configured in such a way as to deny students access to a school. See *People ex rel. Community Unit School District No. 5 v. Decatur School District No. 61*, 31 Ill.2d 612, 613-14, 203 N.E.2d 423 (1964); *Leighty*, 309 Ill. at 35, 139 N.E. 894. The plaintiffs argue that this exception may be applied here because students who are deprived of a minimally adequate education are in reality being deprived of access to an education.

***210** We do not agree that the exception recognized in *Leighty* is applicable here. The plaintiffs have not alleged in this case that schoolchildren are being

denied access to schools. Rather, the plaintiffs complain about the quality of the education that is being provided in those schools. The plaintiffs are thus asking this court to define standards for an adequate education derived solely from the constitution, a task which we have already held we cannot undertake. The plaintiffs urge, however, that this court must be permitted to intervene where, for instance, a school district provides a school that consists of nothing more than a vacant building marked with the word "School." This hypothetical situation, of course, is not presented in this case. Moreover, we consider it highly unlikely that the legislature would ever set standards for education so as to allow for such a situation.

****805 ***8** Parenthetically, we note that those items which the plaintiffs assert are included within the "rudimental elements" of education, *i.e.*, certified teachers, basic instructional materials, and reasonably safe buildings, are addressed by the Illinois School Code. 105 ILCS 5/21-1 through 21-26 (West 1996) (certification of teachers); 105 ILCS 5/28-1 through 28-21 (West 1996) (instructional materials); 105 ILCS 5/2-3.12 (West 1996) (school building code). The plaintiffs emphasize that they are not challenging the constitutionality of the statutory scheme implemented by the legislature to comply with the education article. To the extent the plaintiffs are deprived of services mandated by the School Code, their relief, if any, lies in an action to enforce the Code.

Accordingly, we hold that the plaintiffs may not state a claim based upon violation of the education article of the Illinois Constitution. The circuit court therefore properly dismissed the plaintiffs' education article claim with prejudice.

II. Due Process

We next address whether the plaintiffs may state a ***211** cause of action under the due process provisions of the United States and Illinois Constitutions. We hold that the plaintiffs cannot state a claim for a due process violation under either the United States Constitution or the Illinois Constitution.

A. *Federal Due Process Clause*

[3] We begin our analysis with the federal due process clause. The due process clause of the fourteenth amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. The plaintiffs here rely on the substantive component of the clause. The substantive component protects fundamental liberty interests against infringement by the government, regardless of the procedures provided. *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16 (1993); *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 273 (1992).

[4] Initially, we note that education is not a fundamental right protected by the federal constitution. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); see also *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 34, 220 Ill.Dec. 166, 672 N.E.2d 1178 (1996). The plaintiffs nonetheless attempt to use the federal due process clause to impose on the defendants the affirmative obligation to provide a "minimally safe and adequate education." The plaintiffs ostensibly advance two theories to support the imposition of this duty under the due process clause. First, the plaintiffs argue that the Illinois compulsory education law constitutes a deprivation of the plaintiffs' liberty, which gives rise to an affirmative duty on the part of the state to provide a minimally adequate education. Second, the plaintiffs assert that this duty arose because the defendants subjected the plaintiffs to state-created dangers. We hold that the plaintiffs may not state a claim for a due process violation under either theory.

***212** (1) Compulsory Education Law

[5][6] It is well established that the due process clause does not generally impose any affirmative obligation on the state to provide substantive services to its citizens. *Youngberg v. Romeo*, 457 U.S. 307, 317, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28, 38 (1982); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir.1988). This is true even if such services may be necessary to secure life, liberty or property interests. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 259 (1989). Although the due process clause forbids the state itself from depriving

individuals of life, liberty, or property without due process of law, its language does not impose an affirmative duty on the state to ensure that those interests are not harmed through other means. *DeShaney*, 489 U.S. at 195, 109 S.Ct. at 1003, 103 L.Ed.2d at 259. As the Seventh Circuit Court of Appeals has noted, "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." ***9**806*Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982); see also *Archie*, 847 F.2d at 1220-23 (holding that the state has no due process duty to provide rescue services to those in danger).

The Supreme Court has determined, however, that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S.Ct. at 1004, 103 L.Ed.2d at 260. In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court recognized that the eighth amendment's prohibition on cruel and unusual punishment, made applicable to the states through the due process clause, required a state to provide medical care to incarcerated prisoners. The *Estelle* Court reasoned that because a prisoner, is " 'by reason of the deprivation ***213** of his liberty,' " unable to care for himself, it is "just" that the State be required to care for him. *Estelle*, 429 U.S. at 104, 97 S.Ct. at 291, 50 L.Ed.2d at 260, quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

The rationale of *Estelle* was extended beyond the eighth amendment setting in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In *Youngberg*, the Supreme Court considered the substantive rights of involuntarily committed mentally retarded persons under the due process clause. After noting that, generally, a state is under no constitutional duty to provide substantive services to individuals, the Court found that "[w]hen a person is institutionalized-and wholly dependent on the State-* * * a duty to provide certain services and care does exist." *Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2459, 73 L.Ed.2d at 38. The Court held that the due process clause obligated the state to provide involuntarily committed persons with such services as are necessary to ensure their safety and freedom from undue restraint. *Youngberg*, 457 U.S. at 319, 102 S.Ct. at 2460, 73 L.Ed.2d at 39.

[7] The plaintiffs here seek to extend the rationale of *Youngberg* to apply to this case. The premise for the plaintiffs' argument is that the Illinois compulsory education law, mandating that children of a certain age attend school (105 ILCS 5/26-1 (West 1996)), operates as a restriction on the plaintiffs' liberty similar to the restriction on liberty present in *Youngberg*. It is clear, however, that compulsory education is not the type of restraint on liberty envisioned by the Supreme Court in *Estelle* and *Youngberg* as the basis for imposing an affirmative duty on the state.

The language used by the Court in *Youngberg* demonstrates the distinction. There, the Court stated that a duty to provide certain services and care would be ***214** imposed on a state when a person is institutionalized and therefore "wholly dependent on the State." *Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2459, 73 L.Ed.2d at 38. Moreover, the Supreme Court clarified the limited scope of the *Youngberg* holding in a subsequent case. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Court considered whether the state had violated a child's substantive due process rights by failing to provide him with protection against his father's violence. The evidence showed that the county and its department of social services had been made aware of numerous instances of suspected abuse of the child by his father, had investigated the instances, and had taken temporary custody of the child. The child was, however, returned to the custody of his father, who ultimately beat the child severely. The child, through his guardian, sued the governmental defendants claiming that their failure to protect him deprived him of his liberty in violation of the due process clause.

The *DeShaney* Court reiterated the well-established principle that the due process clause is a limitation on the state's power to act and does not confer any affirmative right to governmental aid. The plaintiff, however, argued that an affirmative duty to provide protective services on the part of the state may arise out of certain "special relationships" created or assumed by the state with respect to particular individuals, and that such a relationship existed in

that case. The Court rejected this argument. In so doing, the Court explained the holdings of *Estelle* and *Youngberg* as follows:

> ****807 ***10** "Taken together, [these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. [Citation.] The rationale for this principle is simple enough: ***215** when The state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs-e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [Citations.] The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citation.] In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint or personal liberty-which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. at 1005-06, 103 L.Ed.2d at 261-62.

[8] The plaintiffs attempt to equate the restraint on schoolchildren's liberty imposed by compulsory education laws with the restraint on liberty discussed in *Youngberg*. It is apparent, however, that the *Youngberg* "custody" exception to the general rule that the due process clause imposes no affirmative obligation on a state to provide aid or services is not applicable to the facts of this case. As explained in *DeShaney*, a much different sort of restraint is required in order to trigger a duty on the part of the state to provide aid or services. The *DeShaney* Court specifically described the requisite restraint by the state as "incarceration, institutionalization, *or other similar restraint.*" (Emphasis added.) *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1006, 103 L.Ed.2d at 262. Notably, in a subsequent case, although not directly addressing the issue, the Supreme Court stated that public schools do not have such a degree of control over children as to give rise to a "duty to protect" under *DeShaney*. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655, 115 S.Ct. 2386, 2392, 132 L.Ed.2d 564, 576 (1995); ***216** see also *Ingraham v. Wright*, 430 U.S. 651, 669, 670, 97 S.Ct. 1401, 1411, 1412, 51 L.Ed.2d 711, 729, 729 (1977) (holding that the eighth amendment's prohibition on cruel and unusual punishment did not apply to the paddling of schoolchildren and rejecting the argument that compulsory education laws placed students in a position similar to that of incarcerated prisoners. The Court explained that prisoners and schoolchildren stand in "wholly different circumstances," and that, "[t]hough attendance may not always be voluntary, the public school remains an open institution").

Numerous decisions from the federal courts of appeals have directly addressed this issue and have concluded that compulsory education laws do not give rise to affirmative duties on the part of the state to provide the protections accorded institutionalized persons. See, *e.g.*, *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 732 (8th Cir.1993); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir.1992); *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1372 (3d Cir.1992); *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 272 (7th Cir.1990). The Seventh Circuit Court of Appeals explained the qualitative difference between compulsory education laws and the types of restraints on liberty that trigger affirmative obligations on the part of the state:

> "We do not suggest that prisoners and mental patients are an exhaustive list of all persons to whom the state owes some affirmative duties, but the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises. Whatever duty of protection does arise is best left to laws outside the Constitution * * *. [Citation.]
>
> ****808 ***11** The state's custody over their person is the most distinguishing characteristic in the cases of the mental patient and the prisoner; these people are unable to provide ***217** for basic human needs like food, clothing, shelter, medical care, and reasonable safety. [Citation.] At most, the

> state might require a child to attend school, [citation], but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs." *J.O.*, 909 F.2d at 272.

The plaintiffs attempt to distinguish this consistent line of authority by asserting that those cases were concerned merely with whether compulsory education laws established a custodial situation which gave rise to a "duty to protect" schoolchildren. The plaintiffs argue that, here, they are not asserting a duty to protect, but a duty to provide a "minimally adequate education." The plaintiffs contend that, in this case, the only question is whether compulsory attendance laws infringe on students' liberty "in some significant manner." The plaintiffs' argument is not persuasive. As noted earlier, the due process clause does not generally impose any affirmative duty on the state to provide aid or services. In *Youngberg*, the Supreme Court recognized a limited exception to this general rule where an individual is in the custody of the state. The plaintiffs rely on this exception to avoid the general rule. This exception, as stated in *Youngberg* and clarified in *DeShaney*, requires a more significant restraint on an individual's liberty than that imposed by compulsory education laws. *DeShaney*, although addressing whether a duty to protect is imposed on the state, nonetheless clarifies the type of restraint on liberty which is necessary under *Youngberg*. Accordingly, *DeShaney*, and the courts of appeal decisions interpreting it in the school context, are relevant here.

The plaintiffs nonetheless assert that *Youngberg* supports their claim in this case because the Court there held that when the state takes custody of an individual, due process requires some rational relationship between the nature and duration of the commitment and its purpose. The plaintiffs contend that, because the state ***218** deprives children of their liberty by compelling school attendance, under this proposition, the state owes them a duty to provide a certain standard of education. First, we note that *Youngberg* did not actually assert this holding. Rather, the plaintiffs glean this proposition from a footnote in *Youngberg* which discussed a *procedural* due process case. *Youngberg*, 457 U.S. at 320 n. 27, 102 S.Ct. at 2460 n. 27, 73 L.Ed.2d at 40 n. 27, citing *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Further, as discussed above, the type of restraint on liberty contemplated in *Youngberg* is not present in the school context. Thus, *Youngberg* does not support the theory that due process requires a certain standard of education be provided where school attendance is mandated by state law. The other case cited by the plaintiffs for this proposition, *Woe v. Cuomo*, 729 F.2d 96 (2d Cir.1984), illustrates this point. *Woe* held that the " 'massive curtailment of liberty' associated with involuntary commitment, [citation], dictates that the 'nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' " *Woe*, 729 F.2d at 105, quoting *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435, 451 (1972). It is important to note that the plaintiffs are not here seeking to invalidate the Illinois compulsory attendance law on the ground that it is an unreasonable restraint on their liberty. Rather, they are seeking to use the due process clause to impose on the defendants an affirmative duty to provide a certain standard of education. Because the clause does not generally impose such affirmative duties, the plaintiffs must establish a basis for creating that duty. The plaintiffs have attempted to use *Youngberg* to create that duty. For the reasons discussed above, *Youngberg* does not apply. In essence, the plaintiffs are attempting to create a federal constitutional right to a particular standard of education based solely on the ***219** fact that school attendance is compulsory in this state. The Supreme Court has cautioned that it is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." ****809***12***Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 273 (1992). We do not agree that the due process clause should be expanded in the manner requested by the plaintiffs here.

Accordingly, we hold that the *Youngberg* "custody" exception to the general rule that substantive due process does not impose an affirmative duty on the state to provide services is not applicable here.

(2) State-created Danger

[9] The plaintiffs alternatively argue that their substantive due process claim may be sustained on the theory that the defendants have "created and perpetuated a school environment that is dangerous to

plaintiffs' health and safety." Pursuant to this theory, the plaintiffs seek a holding that the defendants owe them a duty, under the due process clause, to protect them from unsafe conditions in the schools by remedying these conditions. We note that the plaintiffs do not here assert that any act of the defendants has directly harmed an interest of the plaintiffs protected under the due process clause. Rather, the plaintiffs seek to impose a duty on the defendants to take action to protect the plaintiffs from these allegedly unsafe conditions. The plaintiffs are thus again attempting to use the due process clause to impose an affirmative duty on the defendants.

The plaintiffs' argument on this point is not entirely clear. The plaintiffs partially rely on cases addressing claims that the conditions in prisons and other detention facilities are so abhorrent that they violate the due process rights of the inmates. As the defendants point out, however, those cases address the state's constitutional ***220** obligations to persons in its custody. See, *e.g.*, *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir.1992) (prison conditions); *Gary H. v. Hegstrom*, 831 F.2d 1430 (9th Cir.1987) (juvenile detention facility conditions); *French v. Owens*, 777 F.2d 1250 (7th Cir.1985) (prison conditions). As discussed above, children mandated to attend school by state law are not in the custody of the state as contemplated by these cases.

The plaintiffs also rely on another line of cases. A number of federal courts of appeals have held that *DeShaney* recognized a second exception to the general rule that the due process clause does not impose affirmative obligations on the state. These cases hold that the due process clause imposes a duty on the state to protect or care for citizens when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir.1993); see also *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 733 (8th Cir.1993); *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1373 (3d Cir.1992). In order to employ the "state-created danger" theory, the plaintiff must "plead facts showing some *affirmative act* on the part of the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger." (Emphasis in original.) *Stevens v. Umsted*, 131 F.3d 697, 705 (7th Cir.1997); see also *D.R.*, 972 F.2d at 1374; *Reed*, 986 F.2d at 1125. Mere inaction by state actors, even in the face of a known danger, is not sufficient to trigger an affirmative duty on the part of the state under this theory. *Stevens*, 131 F.3d at 705; *Reed*, 986 F.2d at 1125.

Although a number of decisions have recognized a "state-created danger" exception in some form, the plaintiffs cite to only a few cases which have held that a plaintiff could pursue a substantive due process claim on ***221** this theory. The claims made in those cases are quite unlike the claim made by the plaintiffs here. In *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir.1992), a nurse at a medium security custodial institution for young male offenders was raped by an inmate after her supervisors required her to work alone with the inmate, who was a known violent sex offender. The *L.W.* court held that the nurse could pursue a due process claim because the actions of the state defendants created the danger to which the nurse fell victim, a danger which would not otherwise have existed. *L.W.*, 974 F.2d at 122-23. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), police officers arrested a drunk driver and impounded his car, leaving the driver's passenger stranded in a high crime area in the middle of the night. The passenger was raped as she attempted to make her way home. The *Wood* court ****810 ***13** held that the passenger could pursue her constitutional claim against the defendant officer because his acts triggered a duty on his part to afford her "some measure of peace and safety." *Wood*, 879 F.2d at 589-90.

Likewise, in *White v. Rochford*, 592 F.2d 381 (7th Cir.1979),[FN1] the court sustained a due process claim where a police officer arrested the driver of a car and left several children stranded in the car on the side of a busy highway. In *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998), the court held that the plaintiffs, undercover police officers, could pursue a due process claim under the state-created danger theory where the city released the plaintiffs' personal information to counsel for criminal defendants whom the plaintiffs had aided in apprehending. The *Kallstrom* court reasoned that the city's actions placed the officers in "special danger" that a private actor would deprive them of their liberty interest in personal security. Finally, in *Ross v. United States*, 910 F.2d 1422 (7th Cir.1990), ***222** the court allowed the plaintiff's due process claim to proceed against governmental defendants who affirmatively

prevented people from rescuing the plaintiff's drowning son. The court reasoned that, having placed the plaintiff's decedent in that position, the defendants owed him a duty to provide rescue services. The plaintiffs also cite to *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993). In *Reed*, the court held that the plaintiffs could state a claim for a due process violation under allegations that the police arrested a sober driver and left a drunk passenger in the car, which passenger thereafter drove the car and caused a fatal accident with the plaintiffs. The *Reed* court also noted, however, that the plaintiffs would face an "insurmountable hurdle" on summary judgment because the record showed that the driver the police removed was not sober, as alleged, but was intoxicated. The court noted that, because of that fact, the state could not be liable because the state action did not place the plaintiffs in a position of danger they would not otherwise have faced. *Reed*, 986 F.2d at 1125.

> FN1. *White* was decided prior to *DeShaney* and its usefulness in interpreting the *DeShaney* exceptions is therefore questionable.

Here, the plaintiffs claim simply a due process right to a "safe environment," and allege that certain unsafe conditions exist at various schools. Specifically, the plaintiffs allege that "most" of the school buildings in the district are in "disrepair." In support, the plaintiffs cite to fires and flooding which have occurred, the presence of asbestos, cracked and leaking roofs, faulty heating systems, unsanitary restrooms, burnt-out lightbulbs, malfunctioning windows and water fountains, fire hazards, pests, and cafeterias that serve cold and nonnutritious meals. The cited events occurred in various schools at various times over a time period encompassing the years 1989 through 1995. The plaintiffs blame each of these conditions on the District defendants' failure to maintain the buildings in compliance with the School ***223** Building Code. Notably, the plaintiffs do not allege that any student has actually been injured by any of these conditions. Rather, the complaint asserts that classes have been canceled and that rooms or areas have been sealed-off as a result of these conditions.

The plaintiffs' allegations do not state a claim under the state-created danger theory. First, a review of the complaint reveals that the plaintiffs' claim amounts to allegations that the defendants have failed to act to alleviate certain allegedly unsafe conditions. The plaintiffs charge that the state of disrepair existing at some of the schools is due to the "neglect" of the defendants, namely, the defendants' failure to take measures to address or alleviate the alleged hazardous conditions. As discussed above, those decisions recognizing the "state-created danger" theory require the state actors to have taken *affirmative action* to place the plaintiff in a position of danger from which the state actors then failed to protect the plaintiff. See *Stevens*, 131 F.3d at 705; *Graham v. Independent School District No. I-89*, 22 F.3d 991, 995 (10th Cir.1994). Mere inaction is not enough. *Stevens*, 131 F.3d at 705; *Reed*, 986 F.2d at 1125. Here, the plaintiffs are alleging, at most, inaction on the part of the defendants in allowing these conditions to develop or persist. Further, the only injury ****811 ***14** resulting from these conditions cited by the complaint is class time that was lost because the defendants canceled classes or cordoned-off rooms or areas. The complaint thus pleads that the defendants in fact took steps to protect the plaintiffs from physical harm from these conditions. Absent allegations that the defendants took affirmative action to create or increase the danger and then failed to reasonably respond to protect the plaintiffs, the plaintiffs have not stated a claim under the state-created danger theory.

[10][11] In addition, the mere fact that some District school buildings are in disrepair cannot be found to state a ***224** substantive due process claim. The due process clause "does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202, 109 S.Ct. at 1006, 103 L.Ed.2d at 263. The plaintiffs' claim in this regard is analogous to the claim rejected by the Supreme Court in *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). In that case, the widow of a deceased city employee brought an action alleging that the city violated her husband's substantive due process rights as a result of his death by asphyxia when he entered a manhole to unstop a sewer line. The plaintiff alleged that the city, although cognizant of the hazards of working in sewer lines and manholes, did not train its employees about those hazards, did not provide safety equipment at jobsites, and did not provide safety warnings. The plaintiff claimed that the city deprived her husband of life and liberty by failing to

provide him with a "reasonably safe work environment." *Collins*, 503 U.S. at 125-26, 112 S.Ct. at 1069, 117 L.Ed.2d at 273. The Supreme Court rejected the plaintiff's attempt to bring her claim within the purview of the due process clause. The Court reasoned that "[n]either the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Collins*, 503 U.S. at 126, 112 S.Ct. at 1069, 117 L.Ed.2d at 274. The Court added:

> "Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' [citation], we have previously rejected claims that the Due Process Clause should be interpreted to ***225** impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins*, 503 U.S. at 128, 112 S.Ct. at 1070, 117 L.Ed.2d at 275.

See also *Dorothy J.*, 7 F.3d at 733 (holding that plaintiff's allegation that school officials failed to protect students from a known violent student is the kind of "traditional tort law" claim that the Supreme Court has refused to translate into a due process violation); *Maldonado v. Josey*, 975 F.2d 727, 733 (10th Cir.1992) (noting that "the Due Process Clause 'does not transform every tort committed by a state actor into a constitutional violation' " in rejecting plaintiff's due process claim based on her child's accidental death in school cloakroom), quoting *DeShaney*, 489 U.S. at 202, 109 S.Ct. at 1006, 103 L.Ed.2d at 263.

As in *Collins*, the claim made by the plaintiffs here, that the conditions in the schools are unsafe, is not a substantive due process claim. Rather, the plaintiffs are simply attempting to use the due process clause to "supplant traditional tort law." The plaintiffs contend that *Collins* is distinguishable because the decedent employee in that case had voluntarily chosen to work for the city. In contrast, the plaintiffs assert, they are forced by state law to attend school. Again, the plaintiffs are attempting to merge the two *DeShaney* exceptions, "custody" and "state-created danger," to support their theory that substantive due process obligates the state to provide a "safe and adequate education." We have already held that the plaintiffs' liberty is not so restricted by compulsory education that a duty to provide affirmative protections or services arises under the due process clause pursuant to the "custody" exception.

****812 ***15** The cases cited by the plaintiffs for the proposition that the state-created danger theory has been applied in the school setting are inapposite. In both *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir.1994), and *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir.1989), ***226** the plaintiff-students were sexually abused by teachers. Thus, in both cases, the plaintiff was injured directly by the acts of a state actor and the *DeShaney* exceptions were not applicable. See *Doe*, 15 F.3d at 451 n. 3 (noting that *DeShaney* does not suggest that individuals have no due process rights against an offending state actor); *Stoneking*, 882 F.2d at 725 (stating that nothing in *DeShaney* suggests that state officials may escape liability arising from direct harm caused by the actions of state actors). Likewise, in *Waechter v. School District No. 14-030*, 773 F.Supp. 1005, 1009 (W.D.Mich.1991), the defendant school official's affirmative action caused a student's death. As noted earlier in this opinion, there is a significant difference between using the due process clause as a source of protection from deprivation of liberty interests by the government, and using it as a source of rights to governmental services. The plaintiffs here seek to use the clause to impose an affirmative duty on the defendants. None of the cited cases, however, involved the imposition of an affirmative duty on the state pursuant to the due process clause.

Accordingly, the cases that have imposed an affirmative obligation on the state under the due process clause based on a "state-created danger" theory are not applicable here.

(3) Conclusion-Federal Due Process Clause

We therefore hold that the plaintiffs' complaint fails to state a claim for a violation of the federal due process clause. The circuit court's judgment dismissing this claim with prejudice is affirmed.

B. *Illinois Due Process Clause*

[12] The plaintiffs also contend that they have stated a claim for violation of their due process rights under article I, section 2, of the Illinois Constitution of 1970. The plaintiffs argue that the Illinois due process provision***227** should be construed more broadly than the federal due process clause.

[13][14] The plaintiffs correctly note that this court will construe independently the scope of our state constitution's due process guarantee. See *Rollins v. Ellwood*, 141 Ill.2d 244, 275, 152 Ill.Dec. 384, 565 N.E.2d 1302 (1990). This court has interpreted our state due process clause to provide greater protections than its federal counterpart where we found an appropriate basis to do so. See *People v. Washington*, 171 Ill.2d 475, 485-86, 216 Ill.Dec. 773, 665 N.E.2d 1330 (1996); *People v. McCauley*, 163 Ill.2d 414, 440, 206 Ill.Dec. 671, 645 N.E.2d 923 (1994). Nonetheless, federal precedent interpreting the federal due process clause is useful as a guide in interpreting the Illinois provision. *McCauley*, 163 Ill.2d at 436, 206 Ill.Dec. 671, 645 N.E.2d 923; *Rollins*, 141 Ill.2d at 275, 152 Ill.Dec. 384, 565 N.E.2d 1302.

The plaintiffs have provided no basis for a broader construction of the Illinois due process clause in this context. They cite to no Illinois case that construes the state provision in a manner similar to that urged here. The plaintiffs simply reassert the arguments advanced in support of their claim that the federal due process clause imposes a duty on the defendants to provide the plaintiffs with a minimally safe and adequate education. We find no reason to construe our state due process clause differently than the federal clause on this particular issue. We therefore hold that the plaintiffs have failed to state a claim for a violation of the Illinois due process clause.

III. School Code

[15] We next address whether the plaintiffs may state a claim based upon the Illinois School Code. The plaintiffs' complaint alleges that the defendants violated various sections of the School Code (105 ILCS 5/1-1*et seq.* (West 1996)), and regulations promulgated thereunder, by providing the plaintiffs with "unsafe, educationally inadequate public schools."

The defendants first acknowledge that, under this court's holding in *Noyola v. Board of Education*, 179 Ill.2d 121, 227 Ill.Dec. 744, 688 N.E.2d 81 (1997), ***228** the plaintiffs may pursue****813 ***16** an action for *mandamus* to compel compliance by the defendants with certain duties imposed by the School Code. *Noyola* was decided after the appellate court opinion was filed in this case and the appellate court, therefore, did not consider its impact on this case. In *Noyola*, parents of economically disadvantaged Chicago school students alleged that the Chicago and state boards of education violated provisions of the School Code by the manner in which they allocated certain funds. The plaintiffs contended that they had an implied private right of action to compel the defendants' compliance with the School Code. After examining the history and purpose of implied private rights of action, this court determined that such an action was not the appropriate vehicle for the plaintiffs' claim. Rather, this court concluded, an action for *mandamus* was the proper avenue for the plaintiffs' claim. The court explained that:

> "[u]nlike the [implied private right of action] cases cited above, the plaintiffs in this case are not attempting to use a statutory enactment as the predicate for a tort action. What they want is to force the public officials responsible for implementing section 18-8(A)(5)(i) to do what the law requires.
>
> * * * Where, as alleged here, public officials have failed or refused to comply with requirements imposed by statute, the courts may compel them to do so by means of a writ of *mandamus*, provided that the requirements for that writ have been satisfied." *Noyola*, 179 Ill.2d at 132, 227 Ill.Dec. 744, 688 N.E.2d 81.

This court in *Noyola* concluded that the plaintiffs could pursue a *mandamus* action to compel the defendants' compliance with section 18-8(A)(5)(i)(1) of the School Code. The court reasoned that section 18-8(A)(5)(i)(1) imposed specific requirements regarding the use of the funds in question, and that the plaintiffs' complaint had alleged that the defendants used the funds in violation of those requirements. *Noyola*, 179 Ill.2d at 135, 227 Ill.Dec. 744, 688 N.E.2d 81.

[16] Pursuant to *Noyola*, we hold that the plaintiffs in

***229** this case may be entitled to pursue a *mandamus* action against the defendants. The plaintiffs here do not seek to use the defendants' alleged violations of the School Code as a basis for imposing tort liability on the defendants for injuries caused by the violations. Rather, as in *Noyola,* the plaintiffs seek to force the public officials responsible for implementing various sections of the School Code to do what the law requires. The plaintiffs' complaint does not explicitly seek a writ of *mandamus.* The same was true in *Noyola,* however, and this court nonetheless construed the complaint as sufficiently pleading a *mandamus* action. *Noyola*, 179 Ill.2d at 135, 227 Ill.Dec. 744, 688 N.E.2d 81. We must therefore review the allegations of the plaintiffs' complaint to ascertain whether they have pled the necessary elements for a writ of *mandamus.*

[17][18][19] *Mandamus* is an extraordinary remedy to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Madden v. Cronson*, 114 Ill.2d 504, 514, 103 Ill.Dec. 729, 501 N.E.2d 1267 (1986). A writ of *mandamus* will not be granted unless the plaintiff can show a clear, affirmative right to relief, a clear duty of the defendant to act, and clear authority in the defendant to comply with the writ. *Noyola*, 179 Ill.2d at 133, 227 Ill.Dec. 744, 688 N.E.2d 81; *Orenic v. Illinois State Labor Relations Board*, 127 Ill.2d 453, 467-68, 130 Ill.Dec. 455, 537 N.E.2d 784 (1989); *Chicago Bar Ass'n v. Illinois State Board of Elections*, 161 Ill.2d 502, 507, 204 Ill.Dec. 301, 641 N.E.2d 525 (1994). "The writ will not lie when its effect is 'to substitute the court's judgment or discretion for that of the body which is commanded to act.' " *Chicago Ass'n of Commerce & Industry v. Regional Transportation Authority*, 86 Ill.2d 179, 185, 56 Ill.Dec. 73, 427 N.E.2d 153 (1981), quoting *Ickes v. Board of Supervisors*, 415 Ill. 557, 563, 114 N.E.2d 669 (1953).

The plaintiffs' allegations regarding the defendants' violations of the School Code are brief. The plaintiffs ***230** simply reincorporate by reference all of the prior allegations of the complaint and add the following paragraph:

> "By providing plaintiffs with unsafe, educationally inadequate public schools, the Defendants have violated and are violating ****814 ***17** Sections 2-3.25, 2-3.3, 2-3.6, 10-10, 10-20.19a, 10-21.4, 10-22.18, and 27-1 of the Illinois School Code and Regulations promulgated thereunder, including Ill. Admin. Code title 23, Sections 1, 125, 185 and 254."

We find that, unlike in *Noyola,* we are not able to glean from the plaintiffs' complaint, as currently pled, the necessary allegations for a *mandamus* action. The plaintiffs provide no explanation of what duties the cited sections impose on the defendants, nor do they provide any explanation of how the defendants violated these sections. They have not pled any specific acts or omissions by the defendants that violate official duties imposed on them by the School Code. The dismissal of the plaintiffs' School Code claim must therefore be affirmed. That dismissal, however, should be without prejudice to the plaintiffs to file an amended complaint asserting their School Code claim. If the plaintiffs choose to replead their statutory claim, they must specify the statutory provisions and the acts or omissions of the defendants which entitle them to *mandamus* relief.

We note that the parties dispute the permissible scope of a *mandamus* action. The defendants argue that the plaintiffs may pursue *mandamus* to compel the defendants' performance only of statutory duties that are purely ministerial in nature, allowing no exercise of discretion by the official. The plaintiffs contend, on the other hand, that even a discretionary function may be compelled by means of a writ of *mandamus* under certain circumstances.

Given the factual insufficiency of the plaintiffs' allegations, we do not find it advisable to decide here whether, or under what circumstances, *mandamus* may ***231** ever be pursued to compel the performance of a statutory duty that involves the exercise of discretion. If the plaintiffs choose to replead their statutory claim, each statutory duty the plaintiffs seek to enforce through *mandamus* will have to be evaluated to ascertain if the elements of the writ are satisfied. Thus, as to each allegation, a determination must be made as to whether the particular statutory provision imposed a clear duty to act on a defendant and whether it granted the plaintiffs a clear right to the relief requested. See *Noyola*, 179 Ill.2d at 133, 227 Ill.Dec. 744, 688 N.E.2d 81. Without the benefit of factually sufficient allegations by the plaintiffs, we cannot determine whether *mandamus* would be

proper to remedy any of the defendants' alleged acts or omissions. We therefore remand this cause to the circuit court to allow the plaintiffs the opportunity to plead an action for *mandamus.*

[20] The plaintiffs also contend that, to the extent that *mandamus* is not appropriate for any of their statutory claims, they may pursue those claims under an implied private right of action theory. *Noyola* disposes of this argument. As noted, this court in *Noyola* extensively reviewed the history and purpose of implied private rights of action. The court reasoned that, in Illinois, an implied private right of action under a statute is a means by which a plaintiff may pursue a tort action. If a statute is construed as providing an implied private right of action, the plaintiff may pursue a tort action against a defendant whose violation of the statute proximately caused injury to the plaintiff. *Noyola*, 179 Ill.2d at 129-31, 227 Ill.Dec. 744, 688 N.E.2d 81 (citing *Rodgers v. St. Mary's Hospital*, 149 Ill.2d 302, 173 Ill.Dec. 642, 597 N.E.2d 616 (1992), *Corgan v. Muehling*, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602 (1991), and *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill.2d 379, 59 Ill.Dec. 905, 432 N.E.2d 849 (1982)). The *Noyola* court concluded that those cases recognizing an implied private right of action were inapplicable to the case before it because the *Noyola* plaintiffs were not ***232** attempting to use a statute as a predicate for a tort action. Rather, the plaintiffs sought to compel the public officials responsible for implementing the statutory provision to comply with the law. Accordingly, this court held, the appropriate avenue of relief for the plaintiffs was a writ of *mandamus*, provided that the requirements for that writ had been satisfied. *Noyola*, 179 Ill.2d at 132, 227 Ill.Dec. 744, 688 N.E.2d 81.

Here, as in *Noyola*, the plaintiffs do not seek to use the School Code as a predicate for a tort action but, rather, apparently seek to compel the public officials responsible for ****815 ***18** implementing the Code to fulfill their duties under the Code. The appropriate avenue of relief for the plaintiffs is therefore an action for a writ of *mandamus*, provided the elements of the writ have been satisfied, and not an implied private right of action under the School Code.

We therefore hold that the circuit court's dismissal of the plaintiffs' School Code claim must be affirmed. That dismissal, however, is without prejudice to the plaintiffs to file an amended complaint asserting a *mandamus* action to compel compliance with official duties under the School Code.

IV. Common Law

[21] We next address whether the plaintiffs have sufficiently pled a common law claim against the District defendants. We hold that the trial court correctly dismissed this claim with prejudice.

The section of the plaintiffs' complaint that purports to state a common law claim reincorporates by reference all of the prior allegations of the complaint and then adds the following sentence:

> "By requiring plaintiffs to attend unsafe public schools, defendants have violated common law duties owed to each class member not to subject them to unreasonably dangerous and hazardous conditions."

***233** These allegations are not sufficient to state a common law claim against the District defendants. The plaintiffs allege merely that the defendants have violated "common law duties," without specifying what those duties are or what acts or omissions of the defendants breached those duties. In their brief, the plaintiffs assert a premises liability theory in support of this claim. They argue that the District defendants have violated the duty owed by landowners to protect invitees on their premises from physical harm caused by conditions on the premises. See *Ward v. K mart Corp.*, 136 Ill.2d 132, 146, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990). A landowner is liable for physical harm caused to invitees by a condition on the land if the owner (1) knows or should know of the condition and that it presents an unreasonable risk of harm to such invitees; (2) should expect that invitees will not discover the danger or protect themselves against it; and (3) fails to exercise reasonable care to protect invitees against the danger. *Ward*, 136 Ill.2d at 146, 143 Ill.Dec. 288, 554 N.E.2d 223, citing Restatement (Second) of Torts § 343 (1965).

The plaintiffs cite to several cases in which a public school district has been sued under a premises liability theory. In each of those cases, however, the action was brought on behalf of a child who was injured as a result of an allegedly dangerous condition on the school's premises. See, *e.g.*, *Sidwell*

v. Griggsville Community Unit School District No. 4, 146 Ill.2d 467, 167 Ill.Dec. 1055, 588 N.E.2d 1185 (1992); *Ward v. Community Unit School District No. 220*, 243 Ill.App.3d 968, 184 Ill.Dec. 901, 614 N.E.2d 102 (1993); *Jastram v. Lake Villa School District 41*, 192 Ill.App.3d 599, 139 Ill.Dec. 686, 549 N.E.2d 9 (1989). Here, in contrast, the plaintiffs do not seek damages for an injury they sustained as a result of an allegedly unsafe condition on school property. The plaintiffs do not even allege that any student has been injured by one of these conditions. As stated above, premises liability imposes liability on a landowner for an injury resulting from an unreasonably dangerous ***234** condition on their land. The plaintiffs' claim thus does not state a cause of action under this theory.

[22][23][24] In their brief, the plaintiffs also rely on several cases in which injunctive relief was issued to abate a nuisance. See *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 55 Ill.Dec. 499, 426 N.E.2d 824 (1981); *Parr v. Neal*, 187 Ill.App.3d 58, 134 Ill.Dec. 750, 542 N.E.2d 1257 (1989); *Fink v. Board of Trustees of Southern Illinois University*, 71 Ill.App.2d 276, 218 N.E.2d 240 (1966). The plaintiffs' reliance on these cases is misplaced. A mandatory injunction is an extraordinary remedy which may be granted when a plaintiff establishes that his remedy at law is inadequate and that he will suffer irreparable harm without the injunctive relief. *Sadat v. American Motors Corp.*, 104 Ill.2d 105, 115, 83 Ill.Dec. 577, 470 N.E.2d 997 (1984). Mandatory injunctions are not favored by the courts and are issued only when the plaintiff has established a clear right to relief and the court determines that the urgency of the situation necessitates ****816 ***19** such action. *Sadat*, 104 Ill.2d at 116, 83 Ill.Dec. 577, 470 N.E.2d 997; *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill.App.3d 863, 874, 187 Ill.Dec. 506, 617 N.E.2d 1227 (1993).

Apparently, in advancing this argument, the plaintiffs seek a mandatory injunction ordering the District defendants to remedy the allegedly unsafe conditions in the District schools. The plaintiffs' complaint does not plead the elements necessary for the issuance of a mandatory injunction, however. In each of the cases cited by the plaintiffs, an injunction was issued to abate a particular hazardous condition or activity. See *Wilsonville*, 86 Ill.2d at 37, 55 Ill.Dec. 499, 426 N.E.2d 824 (affirming mandatory injunction requiring operator of chemical waste disposal site to remove all toxic waste); *Parr*, 187 Ill.App.3d at 63, 134 Ill.Dec. 750, 542 N.E.2d 1257 (affirming injunction barring state prison from continuing to operate firing range); *Fink*, 71 Ill.App.2d at 282, 218 N.E.2d 240 (affirming injunction barring defendant from discharging sewage into river). In contrast, the plaintiffs' complaint does not explain precisely what unsafe condition or conditions exist that are in such urgent need of repair that a mandatory ***235** injunction is warranted. Rather, the complaint simply alleges, generally, that the conditions in the schools are "squalid" and cites examples of conditions that have existed in various schools at various times since 1989. These allegations are not sufficient to warrant the extraordinary remedy of a mandatory injunction.

Accordingly, we hold that the plaintiffs' complaint does not state a claim against the District defendants based upon their breach of common law duties. The plaintiffs have not provided any basis for us to grant them relief for injuries which have not occurred, and which may never occur. The trial court's order dismissing the plaintiffs' common law claim with prejudice is therefore affirmed.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the appellate court's judgment. The appellate court judgment reversing the dismissal with prejudice of the plaintiffs' education article, due process, and common law claims is reversed. The circuit court's dismissal with prejudice of each of those claims is affirmed. The appellate court judgment reversing the dismissal with prejudice of the plaintiffs' School Code claim is affirmed, as modified. The circuit court's dismissal of that claim is affirmed, but that dismissal is without prejudice to the plaintiffs to file an amended complaint asserting their School Code claim in accordance with this opinion. The cause is remanded to the circuit court.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed in part and reversed in part; cause remanded.

***236** Chief Justice FREEMAN, concurring in part and dissenting in part:

In *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 23-32, 220 Ill.Dec. 166, 672 N.E.2d 1178 (1996), this court shut the courthouse door to claims

alleging violations of section 1 of the education article of the Illinois Constitution (Ill. Const.1970, art. X, § 1). In this case, the majority nails that door shut. The majority holds that these plaintiffs *may* not-not do not, or could not, but *may* not-state a cause of action for a declaratory judgment based on a violation of the education article. 186 Ill.2d at 210-11, 238 Ill.Dec. at 8, 710 N.E.2d at 805. Relying on *Committee for Educational Rights*, the majority concludes that plaintiffs raise a nonjusticiable political question, which is addressed solely to the legislature.

The majority views plaintiffs as asking Illinois courts "to enter the arena of Illinois public school policy." 186 Ill.2d at 201, 238 Ill.Dec. at 3, 710 N.E.2d at 800.I respectfully disagree. I view plaintiffs as simply asking the judicial department of state government to do its job and interpret the Illinois Constitution. I still am of the opinion that a claim alleging a violation of section 1 of the education article is justiciable. *Committee for Educational Rights*, 174 Ill.2d at 45-58, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). In this case, I agree with the appellate court that, at the least, plaintiffs *could* allege sufficient****817 ***20** facts to state a cause of action for a declaratory judgment. Accordingly, I dissent from part I of the majority opinion.

BACKGROUND

This claim is before us following its dismissal pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1994)). A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint. In ruling on the motion, a court must accept as true all well-pled facts in the complaint and all reasonable inferences which can be drawn therefrom. The motion presents the question of whether the allegations of the complaint,***237** when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 86, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). Review is *de novo*. *Vernon v. Schuster*, 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997).

The majority relates the physical condition of public schools in East St. Louis School District 189. 186 Ill.2d at 202, 238 Ill.Dec. at 3-4, 710 N.E.2d at 800-801. However, the majority does not adequately relate the effect that these abhorrent physical conditions have on schoolchildren. I agree with the appellate court that the complaint's introductory section accurately reflects the factual allegations in the body of the complaint:

> " 'For themselves, and on behalf of all school-age children in East St. Louis School District 189 * * *, Plaintiffs bring this class action to enforce their constitutional and statutory rights to a safe and adequate public school education.
>
> By any reasonable measure, the public schools of District 189 are neither safe nor adequate. Strangers wander in and out of junior high schools. Fire alarms malfunction, and firefighters find emergency exits chained shut as they rescue children from burning schools. Classrooms are sealed to protect students from asbestos and dangerous structural flaws.
>
> In dark corridors, light bulbs go unreplaced and rain seeps through leaky roofs. In heavy rains backed-up sewers flood school kitchens, boilers, and electrical systems, resulting in student evacuations and cancelled classes. Bathrooms are unsanitary and water fountains are dry or spew brown water.
>
> In winter, students sit through classes wearing heavy coats because broken windows and faulty boilers go unrepaired. They struggle to learn using meager instructional equipment and tattered, dated textbooks. School libraries are locked or destroyed by fire. Children never know whether they will have a teacher, since District 189 is chronically short staffed, and teachers are often absent or ***238** disengaged from students.
>
> In these squalid surroundings, and denied adequate instruction, children cannot reasonably be expected to learn. On standardized tests, District 189 students score significantly below students in other districts, and most fail to achieve official State minimum goals. Deprived of even a minimally adequate education, barely half the

> District's students graduate from high school, and many who manage to graduate are ill-prepared for skilled jobs, college or meaningful participation in a democratic society. Defendants are legally obligated to take all measures necessary to provide Plaintiffs with such an education, yet, for decades, [they] have knowingly allowed conditions and services to deteriorate so that District 189 now provides one of the worst school systems in the nation.
>
> Plaintiffs bring this action to correct these intolerable and illegal conditions * * *. * * *
>
> Plaintiffs seek an order compelling Defendants to take all appropriate and meaningful measures to provide, at long last, the safe and adequate schools to which Plaintiffs and all Illinois children are entitled.' " 287 Ill.App.3d at 825-26, 223 Ill.Dec. 380, 679 N.E.2d 831.

****818 ***21** DISCUSSION

I. Justiciability

Plaintiffs contend that defendants are violating the first sentence of the second paragraph of section 1 of the education article of the Illinois Constitution: " 'The State shall provide for an efficient system of high quality public educational institutions and services.' " 186 Ill.2d at 205, 238 Ill.Dec. at 5, 710 N.E.2d at 802, quoting Ill. Const.1970, art. X, § 1 (hereafter the education system provision). Relying on *Committee for Educational Rights,* the majority concludes that "plaintiffs may not state a claim based upon violation of the education article of the Illinois Constitution." 186 Ill.2d at 210, 238 Ill.Dec. at 8, 710 N.E.2d at 805. However, I agree with the appellate court that "the Illinois Constitution does indeed provide for at least a minimally adequate education and that those allegedly harmed by the lack of education, such as these plaintiffs, ***239** may bring that cause of action in the circuit courts of Illinois." 287 Ill.App.3d at 827, 223 Ill.Dec. 380, 679 N.E.2d 831.

In *Committee for Educational Rights,* I concluded as follows. Based on the plain language of the education article of the 1970 Illinois Constitution, the record of the 1970 Illinois Constitutional Convention, a comparison of the 1970 constitution to the 1870 constitution, and fundamental principles of constitutional law, "the education system provision is a constitutional directive to the three branches of state government to fulfill their duties in accordance with their traditional roles under separation of powers principles." *Committee for Educational Rights,* 174 Ill.2d at 47, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). "Since the education system provision is addressed to the entire state government, and since the judiciary is a coordinate branch of state government, I would hold that the education system provision is judicially enforceable." *Committee for Educational Rights,* 174 Ill.2d at 52, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part).

Since the education system provision is judicially enforceable, it accordingly falls upon the judicial department of our state government to interpret it when properly raised. *Committee for Educational Rights,* 174 Ill.2d at 53, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663, 686 (1962); see *Committee for Educational Rights,* 174 Ill.2d at 54, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). It is the function and duty of the supreme court-not the legislature-to act as the final arbiter of the Illinois Constitution. *People ex rel. Harrod v. Illinois Courts Comm'n,* 69 Ill.2d 445, 458, 14 Ill.Dec. 248, 372 N.E.2d 53 (1977); accord 1 T. Cooley, Constitutional Limitations 104-07 (8th ed. 1927). I agree with Judge Cooley that "[t]he right and the power of the courts to do this are so plain, and ***240** the duty is so generally-we almost say universally-conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject." 1 T. Cooley, Constitutional Limitations 106-07 (8th ed. 1927).

Subsequent to *Committee for Educational Rights,* the Ohio Supreme Court was presented with this issue in *DeRolph v. State,* 78 Ohio St.3d 193, 677 N.E.2d 733 (1997). Early in the opinion the court declared:

> "Under the long-standing doctrine of judicial

> review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional. [Citation.] We are aware that the General Assembly has the responsibility to enact legislation and that such legislation is presumptively valid. [Citations.] However, this does not mean that we may turn a deaf ear to any challenge to laws passed by the General Assembly. The presumption that laws are constitutional is rebuttable. *Id.* The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial****819 ***22** arbiters and to pass our responsibilities onto the lap of the General Assembly." *DeRolph*, 78 Ohio St.3d at 198, 677 N.E.2d at 737.

Regrettably, this is exactly what this court has done.

Further, I note the applicability of *People ex rel. Leighty v. Young*, 301 Ill. 67, 71, 133 N.E. 693 (1921), where this court reasoned: "[i]t cannot be said that a system which places the school house at a point so remote that the children of school age cannot reach it conveniently is either thorough or efficient." In this case, the majority rejects plaintiffs' argument that the quality of education in District 189 is so abysmal that schoolchildren are actually being deprived access to an education. The majority reasons that "plaintiffs have not alleged in this case that schoolchildren are being denied access to schools. Rather, the plaintiffs complain about the quality of the ***241** education that is being provided in those schools." 186 Ill.2d at 210, 238 Ill.Dec. at 7, 710 N.E.2d at 804.

The majority apparently overlooks significant factual allegations in the complaint, a summary of which I earlier quoted. Plaintiffs allege that the physical condition of some District 189 schools, or portions thereof, are so dangerously abysmal that they are actually closed. 287 Ill.App.3d at 825-26, 223 Ill.Dec. 380, 679 N.E.2d 831. Thus, schoolchildren are *physically* being denied access to an education within the reasoning of *Leighty*. I am troubled by the majority's view that District 189 schools are better than a vacant building marked with the word "School." 186 Ill.2d at 210, 238 Ill.Dec. at 7, 710 N.E.2d at 804. I am at a loss as to what additional allegations the majority needs. Plaintiffs plead facts that are disgusting and shameful. Curiously, the majority doubts "that the legislature would ever set standards for education so as to allow for such a situation." 186 Ill.2d at 210, 238 Ill.Dec. at 7, 710 N.E.2d at 804. However, the facts alleged here plainly show that "such a situation" exists.

II. The Merits

The appellate court found that plaintiffs do not plead "sufficiently detailed facts stating the particular acts or omissions of defendants that have allegedly created the abhorrent conditions attributed to these schools. Without factual allegations alleging the specific wrongs of defendants, the complaint cannot allege a cause of action upon which relief can be granted." 287 Ill.App.3d at 827, 223 Ill.Dec. 380, 679 N.E.2d 831. However, the appellate court went on to hold that plaintiffs *may* bring a cause of action under the education article (287 Ill.App.3d at 827, 223 Ill.Dec. 380, 679 N.E.2d 831) and that sufficient facts *could* exist to state such a claim (287 Ill.App.3d at 831, 223 Ill.Dec. 380, 679 N.E.2d 831).

I agree. I earlier explained why plaintiffs' complaint is legally sufficient. A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proved under the allegations that ***242** would entitle the party to relief. *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455, 473, 151 Ill.Dec. 560, 564 N.E.2d 1222 (1990); *Ogle v. Fuiten*, 102 Ill.2d 356, 360-61, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984). At the least, plaintiffs could allege sufficient facts to state a cause of action for a declaratory judgment.

CONCLUSION

In *Committee for Educational Rights*, I criticized the majority for abandoning its responsibility to interpret the Illinois Constitution. *Committee for Educational Rights*, 174 Ill.2d at 62, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). As a result of that decision, the judiciary became powerless to enforce the constitution, *i.e.*, to inquire "into whether the legislative and executive departments of our state government conform to the education system provision." *Committee for Educational Rights*, 174 Ill.2d at 58, 220 Ill.Dec. 166, 672 N.E.2d 1178 (Freeman, J., concurring in part and dissenting in part). In this case, the majority

continues to turn the provision into a dead letter. See *DeRolph*, 78 Ohio St.3d at 263, 677 N.E.2d at 781 (Pfeifer, J., concurring).

I would hold that plaintiffs' claim is justiciable and that plaintiffs should be given an ****820 ***23** opportunity to amend their complaint. Accordingly, I dissent from part I of the majority opinion.

Justice HARRISON joins in this partial concurrence and partial dissent.
Ill.,1999.
Lewis E. v. Spagnolo
186 Ill.2d 198, 710 N.E.2d 798, 238 Ill.Dec. 1, 141 Ed. Law Rep. 222

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TAB 13

HVan Meter v. Darien Park Dist.
Ill.,2003.

Supreme Court of Illinois.
William VAN METER et al., Appellants,
v.
The DARIEN PARK DISTRICT et al., Appellees.
No. 90541.

Oct. 17, 2003.

Homeowners brought negligence action against municipal defendants, among others, alleging that surface water flooded home upon completion of adjacent municipal recreation area. The Circuit Court, Du Page County, Rodney W. Equi and James W. Jerz, JJ., granted municipal defendants' motion to dismiss. Homeowners appealed, and the Appellate Court affirmed. Granting homeowners' petition for leave to appeal, the Supreme Court, Kilbride, J., held that questions of material fact existed as to whether conduct of municipal defendants in designing and constructing municipal recreation area in such a manner as to allegedly cause surface water to flood adjacent home was result of a policy decision and was discretionary, precluding an involuntary dismissal of negligence complaint based on affirmative defense of discretionary act immunity.

Judgment of Appellate Court reversed and remanded.

Fitzgerald, J., filed a dissenting opinion in which Garman, J., joined.

Garman, J., filed a dissenting opinion in which Fitzgerald, J., joined.

West Headnotes

[1] Pretrial Procedure 307A 531

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)1 In General
307Ak531 k. Nature and Scope of Remedy in General. Most Cited Cases
Purpose of a motion for involuntary dismissal is to dispose of issues of law and easily proved issues of fact at the outset of litigation. S.H.A. 735 ILCS 5/2-619.

[2] Pretrial Procedure 307A 561.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases
In context of motion for involuntary dismissal, an "affirmative matter" avoiding the legal effect of or defeating the claim is something in the nature of a defense which negates the cause of action completely. S.H.A. 735 ILCS 5/2-619(a)(9).

[3] Pretrial Procedure 307A 561.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases

Pretrial Procedure 307A 686.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak686 Matters Deemed Admitted
307Ak686.1 k. In General. Most Cited Cases
Party that moves for involuntary dismissal of action based on an affirmative matter admits legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the

plaintiff's claim. S.H.A. 735 ILCS 5/2-619(a)(9).

[4] Pretrial Procedure 307A 562

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak562 k. Particular Defenses. Most Cited Cases
Immunity under Local Governmental and Governmental Employees Tort Immunity Act is an affirmative matter properly raised in a motion to dismiss. S.H.A. 735 ILCS 5/2-619(a)(9); 745 ILCS 10/2-201.

[5] Pretrial Procedure 307A 679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of Pleadings. Most Cited Cases
When a court rules on a motion to dismiss, it must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. S.H.A. 735 ILCS 5/2-619.

[6] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Review of an involuntary dismissal is de novo. S.H.A. 735 ILCS 5/2-619.

[7] Municipal Corporations 268 723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Local Governmental and Governmental Employees Tort Immunity Act does not create new duties; rather, it merely codifies those duties existing at common law to which the subsequently delineated immunities apply. S.H.A. 745 ILCS 10/1-101 et seq.

[8] Municipal Corporations 268 723.5

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723.5 k. Constitutional and Statutory Provisions. Most Cited Cases
Since Local Governmental and Governmental Employees Tort Immunity Act was enacted in derogation of the common law, it must be strictly construed. S.H.A. 745 ILCS 10/1-101 et seq.

[9] Municipal Corporations 268 723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Unless an immunity provision applies under Local Governmental and Governmental Employees Tort Immunity Act, municipalities are liable in tort to the same extent as private parties. S.H.A. 745 ILCS 10/1-101 et seq.

[10] Waters and Water Courses 405 119(2)

405 Waters and Water Courses
405V Surface Waters
405k119 Drainage or Discharge
405k119(2) k. Artificial Drainage or Discharge in General. Most Cited Cases
At common law, a landowner bears a duty not to increase the natural flow of surface water onto the property of an adjacent landowner.

[11] Municipal Corporations 268 835

268 Municipal Corporations
268XII Torts

268XII(D) Defects or Obstructions in Sewers, Drains, and Water Courses
268k835 k. Obstruction or Diversion of Flow of Surface Water. Most Cited Cases
Local public entity bears a common law duty not to increase the natural flow of surface water onto the property of an adjacent landowner.

[12] Municipal Corporations 268 723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Existence of a duty and the existence of an immunity under Governmental and Governmental Employees Tort Immunity Act are separate issues. S.H.A. 745 ILCS 10/1-101 et seq.

[13] Municipal Corporations 268 742(5)

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k742 Actions
268k742(5) k. Evidence. Most Cited Cases
Because statutory immunities afforded to governmental entities operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity. S.H.A. 745 ILCS 10/1-101 et seq.

[14] Pretrial Procedure 307A 681

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak681 k. Matters Considered in General. Most Cited Cases

Pretrial Procedure 307A 685

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak685 k. Affidavits or Other Showing of Merit. Most Cited Cases
Affirmative matter asserted by defendant as basis for involuntary dismissal of claim must be apparent on the face of the complaint; otherwise, the motion must be supported by affidavits or certain other evidentiary materials. S.H.A. 735 ILCS 5/2-619(a)(9).

[15] Pretrial Procedure 307A 683

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak683 k. Presumptions and Burden of Proof. Most Cited Cases
Once defendant satisfies initial burden of going forward on motion for involuntary dismissal on ground that claim is barred by other affirmative matter avoiding legal effect of or defeating claim, burden shifts to plaintiff to establish that the defense is unfounded or requires resolution of essential element of material fact before it is proven. S.H.A. 735 ILCS 5/2-619(a)(9).

[16] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Appeal from involuntary dismissal on ground that claim is barred by other affirmative matter avoiding legal effect of or defeating claim is the same in nature as an appeal following grant of summary judgment and is likewise afforded de novo review. S.H.A. 735 ILCS 5/2-619(a)(9).

[17] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Court reviewing an involuntary dismissal on ground that claim is barred by other affirmative matter avoiding legal effect of or defeating claim must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. S.H.A. 735 ILCS 5/2-619(a)(9).

[18] Appeal and Error 30 762

30 Appeal and Error
30XII Briefs
30k762 k. Reply Briefs. Most Cited Cases
Argument raised by homeowners in reply brief on appeal from dismissal of negligence action against municipal defendants in connection with alleged flooding of home, that defendants' actions were "unique" to their particular public offices, was in answer to arguments advanced by defendants that their actions were "discretionary" within meaning of Local Governmental and Governmental Employees Tort Immunity Act, and therefore motion to strike that argument by homeowners as not confined to arguments raised in defendants' responsive briefs would be denied. S.H.A. 735 ILCS 5/2-619(a)(9); 745 ILCS 10/2-201; Sup.Ct.Rules, Rule 341(g).

[19] Municipal Corporations 268 728

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 k. Discretionary Powers and Duties. Most Cited Cases
Municipal defendants are required to establish both the making of a policy choice and the exercise of discretion in order to invoke discretionary immunity under Local Governmental and Governmental Employees Tort Immunity Act. S.H.A. 745 ILCS 10/2-201.

[20] Pretrial Procedure 307A 680

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak680 k. Fact Questions. Most Cited Cases
Questions of material fact existed as to whether conduct of municipal defendants in designing and constructing municipal recreation area in such a manner as to allegedly cause surface water to flood adjacent home was the result of a policy decision and was discretionary, precluding an involuntary dismissal of homeowners' negligence complaint based on affirmative defense of discretionary immunity. S.H.A. 735 ILCS 5/2-619(a)(9); 745 ILCS 10/2-201.

****275 ***557** Spina, McGuire & Okal, P.C., Elmwood Park (Timothy H. Okal, of counsel), for appellants.
Howard K. Priess II, Telly J. Liapis and D.J. Sartorio, of Tressler, Soderstrom, Maloney & Priess, Chicago, for appellee Darien Park District.
Russell W. Hartigan and Paul C. Jakubiak, of Hartigan & Cuisinier, P.C., Chicago, for appellee City of Darien.
Norton, Mancini, Argenati, Weiler & DeAno, Wheaton (James L. DeAno, of counsel), for appellee Village of Downers Grove.
Joseph E. Birkett, State's Attorney, Wheaton (Margaret M. Healy and Anthony E. Hayman, Assistant State's Attorneys, of counsel), for appellee County of Du Page.

Justice KILBRIDE delivered the opinion of the court:
***362** The plaintiffs, William and Patricia Van Meter, filed a complaint against the Darien Park District, the City of Darien, the Village of Downers Grove, the County of ***363** Du Page, and five private defendants, alleging that surface water flooded their home upon completion of an adjacent municipal ****276 ***558** recreation area called Westwood Park (the park). The municipal defendants filed motions to dismiss, pursuant to section 2-619 (a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 1994)), alleging that they were entitled to discretionary immunity under section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/2-201 (West 1994)). The Du Page County circuit court granted the municipal defendants' motions to dismiss, and the appellate court affirmed. No. 2-99-0009, 316 Ill.App.3d 1300, 268 Ill.Dec. 912, 779 N.E.2d 526

(unpublished order under Supreme Court Rule 23). We granted the plaintiffs' petition for leave to appeal (177 Ill.2d R. 315) and now reverse.

I. BACKGROUND

The plaintiffs' 20-count complaint alleged negligence, *res ipsa loquitur*, and trespass and unlawful taking claims against the municipal defendants. In their complaint, the plaintiffs alleged that they own a single-family residence in Darien. According to the plaintiffs, the defendants started designing and planning the park on property between Darien and Downers Grove in March 1992. Together with engineers and architects, the defendants produced a "Landscape Development Plan," depicting drainage of surface and subsurface water, as well as changes in the elevation of the property affecting the natural flow of water. The Darien Park District approved the plan in conjunction with requirements imposed by the City of Darien, the Village of Downers Grove and Du Page County. Pursuant to the plan, the defendants, through their contractors, constructed a storm water drainage and detention system to restrict water from the environs of the park development and to prevent water from flowing in its natural course.

The plaintiffs alleged that the defendants owed "a ***364** duty to the Plaintiffs to provide adequate drainage for the passage of water from and/or around Plaintiffs' property and not to alter the natural flow of water so as to cause water to back-up and flood Plaintiffs' real estate and residence." The plaintiffs further alleged that the defendants knew or should have known, when they approved the park plans, that the alterations in the natural flow of water would cause flooding problems for neighboring residents. According to the plaintiffs, the defendants breached this duty by failing to design, plan, supervise, observe, or manage properly the construction of Westwood Park. The plaintiffs specified several defects in the park construction, including an insufficient storm water drainage system that (1) alters the groundwater elevation; (2) restricts the natural flow of water; and (3) diverts water from adjoining property onto the plaintiffs' property.

The plaintiffs charged that the defendants negligently caused flooding on the plaintiffs' property and that the defendants negligently failed to correct the defects in the park design and construction "after being placed on notice that the use of those public improvements have [*sic*] created conditions that are not reasonably safe." The plaintiffs asserted that, before 1996, the year the project was completed, they suffered no flooding. In their trespass/unlawful taking counts, the plaintiffs alleged that the park construction has caused and still causes flooding on their property. This "continuing trespass," a purported "constant diversion" of water, has robbed them of the "peaceable enjoyment, occupation, possession, and use of their residence" and lowered the value of their property.

The defendants each filed motions to dismiss, pursuant to section 2-619(a)(9) of ****277 ***559** the Code of Civil Procedure (735 ILCS 5/2-619 (a)(9) (West 1994)), asserting that plaintiffs' claims were barred by defendants' affirmative ***365** defense of immunity under section 2-201 of the Act (745 ILCS 10/2-201 (West 1994)). On September 17, 1998, the trial court dismissed the plaintiffs' claims against the Darien Park District, Darien, and Downers Grove under section 2-201 of the Act, providing governmental entities with immunity from liability for acts or omissions arising from a determination of policy and an exercise of discretion. 745 ILCS 10/2-201 (West 1994); *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 341, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998). On December 3, 1998, the trial court denied the plaintiffs' motion to reconsider, stating:

"[W]hat could be more discretionary than trying to decide how the landscape is going to be reconfigured to accommodate this park that they wanted to put here? I mean, that's almost discretionary by definition, isn't it?

You have to decide how you're going to change the landscape. You have to decide how you're going to reconfigure the surface flow of water because the park doesn't do any good if it's under water.

And so everybody sits around the table and decides how are we going to do this and what's our best judgment as to how we should design this so it does a minimum amount of damage to the surrounding properties and redirects the surface flow of the waters, so that we can build this park here.

What's more discretionary than that? If I apply the *ad hoc* test to these facts, how do I not conclude that the design of this park was a discretionary function?

* * *

I think that even taking the facts as alleged in the plaintiff's [*sic*] complaint as true and indulging all reasonable inferences therefrom in favor of the plaintiff, that my conclusion to be drawn from those facts is that this is a discretionary function on behalf of the municipalities which, in fact, immunizes them therefore under 2-201."

Because other counts remained pending against the private defendants, the trial court found that its dismissal was final as to the Darien Park District, Darien, and ***366** Downers Grove and that there was no just reason to delay enforcement or appeal pursuant to Supreme Court Rule 304(a) (155Ill.2dR. 304(a)). On January 21, 1999, the court dismissed the plaintiffs' claims against Du Page County under section 2-201. This order also contained Rule 304(a) language.

The appellate court affirmed the trial court's dismissals, holding that the defendants enjoyed immunity under section 2-201. The appellate court stated in pertinent part as follows:

"Defendants, through their employees, used their skill, judgment, and ultimately their discretion to consider the design of the park, its landscaping, and the type of construction. Employees of the defendants, in each of their respective municipal capacities, balanced competing interests when determining whether and how the flow of water should be directed and restricted.

The Act provides for immunity of public entities, such as defendants, which, through their employees, exercised their judgment and discretion when they determined how to design, plan, supervise, observe, or manage the construction of Westwood Park. Therefore, to the extent any adoption of a plan or design of the construction of Westwood Park by defendants caused plaintiffs' damages, the Act precludes recovery from defendants." No. 2-99-0009, ****278***560**316 Ill.App.3d 1300, 268 Ill.Dec. 912, 779 N.E.2d 526 (unpublished order under Supreme Court Rule 23).

We allowed plaintiff's petition for leave to appeal. 177 Ill.2d R. 315. Before this court, plaintiffs argue that the trial and appellate courts misapplied section 2-201 of the Act. For the reasons that follow, we agree and reverse.

II. ANALYSIS

In the matter before us, the parties dispute whether the circuit court properly granted defendants' section 2-619(a)(9) motions to dismiss plaintiffs' complaint on the basis that section 2-201 of the Tort Immunity Act completely immunized defendants from liability for the acts and omissions stated in plaintiffs' complaint. According to plaintiffs, the circuit court improperly ***367** dismissed their complaint because defendants did not establish that their alleged actions were "discretionary" within the meaning of section 2-201. Defendants counter that the circuit court properly dismissed plaintiffs' complaint under section 2-619(a)(9) because, despite their duty not to alter the natural flow of water onto another's land, they are entitled to absolute immunity regarding all of their decisions with respect to the planning and construction of Westwood Park because all decisions involved the exercise of discretion. Accordingly, defendants argue, their actions fall squarely within the purview of the immunity provided under section 2-201 of the Act. We disagree. For the reasons discussed below, we hold that the circuit court improperly dismissed plaintiffs' claims as to these municipal defendants.

[1][2][3][4][5][6] The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Zedella v. Gibson*, 165 Ill.2d 181, 185, 209 Ill.Dec. 27, 650 N.E.2d 1000 (1995). Specifically, section 2-619(a)(9) of the Code of Civil Procedure permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 1998). An " 'affirmative matter,' in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely * * *." *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 486, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). The moving party thus admits the legal sufficiency of the complaint, but asserts an affirmative defense or other

matter to defeat the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 115, 189 Ill.Dec. 31, 619 N.E.2d 732 (1993). Immunity under the Act is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. *Bubb v. Springfield School District 186*, 167 Ill.2d 372, 378, 212 Ill.Dec. 542, 657 N.E.2d 887 (1995). When a court rules on a section 2-619 motion to dismiss, it "must interpret all pleadings***368** and supporting documents in the light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill.2d 179, 189, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997). Our review of a section 2-619 dismissal is *de novo*. *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 383, 227 Ill.Dec. 560, 687 N.E.2d 1042 (1997).

In 1959, this court abolished sovereign immunity from tort claims for municipalities. *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959). In 1965, the General Assembly responded by enacting the Local Governmental and Governmental Employees Tort Immunity Act. *Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 43, 231 Ill.Dec. 914, 697 N.E.2d 699 (1998). The 1970 Illinois Constitution validated both *Molitor* and the Act. ****279***561***Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 344, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998); see Ill. Const. 1970, art. XIII, § 4 ("Except as the General Assembly may provide by law, sovereign immunity in this State is abolished"); see also Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 Nw. U.L.Rev. 265 (1966).

[7][8][9] The Act serves to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1(a) (West 1998); see *Epstein*, 178 Ill.2d at 375, 227 Ill.Dec. 560, 687 N.E.2d 1042.[FN1] By providing immunity, the General Assembly sought to prevent the dissipation of public funds on damage awards in tort cases. See *Bubb*, 167 Ill.2d at 378, 212 Ill.Dec. 542, 657 N.E.2d 887. The Act does not create new duties; rather, it " 'merely codifies those duties existing at common law[ ] to which the subsequently delineated immunities apply.' " *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490, 256 Ill.Dec. 848, 752 N.E.2d 1090 (2001), quoting *Barnett v. Zion Park District*, 171 Ill.2d 378, 386, 216 Ill.Dec. 550, 665 N.E.2d 808 (1996). Since the Act was enacted in derogation of the common law, it must be strictly construed. *Snyder v. Curran Township*, 167 Ill.2d 466, 477, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995). Unless an immunity provision applies,***369** municipalities are liable in tort to the same extent as private parties. See *Barnett*, 171 Ill.2d at 386, 216 Ill.Dec. 550, 665 N.E.2d 808.

> FN1. The parties do not dispute that the defendants are all local public entities under the Act. See 745 ILCS 10/1-206 (West 1998).

[10][11] In the matter at bar, plaintiffs, in their amended complaint, allege substantially identical conduct on the part of each municipal defendant relating to the defendants' involvement in the planning and development of Westwood Park. With respect to each defendant, plaintiffs assert that the defendants "breached their duty to the plaintiffs by causing or allowing a change in the natural groundwater elevation and flow of groundwater to occur resulting in water from adjoining lands to gather on plaintiffs' property and the flooding of plaintiffs' real estate and residence." At common law, a landowner bears a duty not to increase the natural flow of surface water onto the property of an adjacent landowner. See *Templeton v. Huss*, 57 Ill.2d 134, 141, 311 N.E.2d 141 (1974); *Daum v. Cooper*, 208 Ill. 391, 397-98, 70 N.E. 339 (1904); see generally 36 Ill. L. & Prac. § 3, at 53 (1958) ("an upper landowner has no legal right to collect and discharge on to a servient estate any surface water which would not naturally flow in the direction of the servient estate"); 36 Ill. L. & Prac. § 6, at 55-56 (1958) (stating that "[a] landowner may maintain an action to recover the damages suffered by him where another landowner improperly drains surface water onto his land. * * * An action in chancery will also lie to enjoin a property owner from improperly draining surface waters onto another's land to the injury of the latter"). This common law duty applies equally to private and public landowners. Accordingly, a local public entity bears a common law duty not to increase the natural flow of surface water onto the property of an adjacent landowner.

[12][13] Our inquiry, however, is not concluded. After determining that a duty exists, we must next address whether provisions of the Tort Immunity Act

immunize the municipal defendants in the matter at bar from liability ***370** for alleged breaches of ****280 ***562** this duty. As stated, the Tort Immunity Act adopted the general principle that " 'local governmental units are liable in tort but limited this [liability] with an extensive list of immunities based on specific government functions.' " *Zimmerman*, 183 Ill.2d at 43, 231 Ill.Dec. 914, 697 N.E.2d 699, quoting *Burdinie*, 139 Ill.2d at 506, 152 Ill.Dec. 121, 565 N.E.2d 654. Moreover, "the existence of a duty and the existence of an immunity are separate issues." *Barnett*, 171 Ill.2d at 388, 216 Ill.Dec. 550, 665 N.E.2d 808. The question thus becomes whether the Act insulates the defendants from the plaintiffs' viable common law tort claims. See *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490, 256 Ill.Dec. 848, 752 N.E.2d 1090 (2001) ("to determine whether [an] entity is liable for the breach of a duty, we look to the Tort Immunity Act, not the common law"). Because the immunities afforded to governmental entities operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity under the Act. It is only when the governmental entities have met this burden that a plaintiff's right to recovery is barred. *Zimmerman*, 183 Ill.2d at 44, 231 Ill.Dec. 914, 697 N.E.2d 699; *Bubb*, 167 Ill.2d at 378, 212 Ill.Dec. 542, 657 N.E.2d 887.

The trial and appellate courts held that defendants here met that burden, finding that section 2-201 provides immunity in this case. Section 2-201 extends the most significant protection afforded to public employees under the Act. D. Baum, *Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act*, 1966 U. Ill. L.F. 981, 994. According to section 2-201:

"Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 1998).

We first extensively discussed the scope of section 2-201 immunity in ***371***Snyder v. Curran Township*, 167 Ill.2d 466, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995). In *Snyder*, the plaintiff lost control of her van when she encountered a sharp turn at the top of a hill on a rural road. The plaintiff sued Curran Township for its negligent failure to place a warning sign before the curve in conformity with the Illinois Vehicle Code, and the township claimed immunity under section 2-201. On appeal from a jury verdict in favor of the plaintiff, the appellate court held that section 2-201 provided immunity. *Snyder v. Curran Township*, 267 Ill.App.3d 174, 204 Ill.Dec. 44, 641 N.E.2d 3 (1994).

This court reversed, observing that the appellate court's erroneous conclusion "rested on an impermissibly expansive definition of discretionary immunity." *Snyder*, 167 Ill.2d at 472, 212 Ill.Dec. 643, 657 N.E.2d 988. We rejected the appellate court's reasoning that, unless a specific rule, statute, or legal order mandates a certain course of conduct, a government official can characterize any given action as discretionary and, therefore, immune from liability in tort. *Snyder*, 167 Ill.2d at 473, 212 Ill.Dec. 643, 657 N.E.2d 988. We recognized that:

"the distinction between discretionary and ministerial functions resists precise formulation, and that the determination whether acts are discretionary or ministerial must be made on a case-by-case basis. [Citations.] Indeed, Prosser notes that this distinction is 'finespun and more or less unworkable. * * * "It would be difficult to conceive of any official act * * * that did not admit of ****281 ***563** some discretion in the manner of its performance, even if it involved only the driving of a nail." ' " *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988, quoting W. Prosser, Torts § 132, at 988-90 (4th ed. 1971), quoting *Ham v. County of Los Angeles*, 46 Cal.App. 148, 162, 189 P. 462, 468 (1920).

We then defined the terms "discretionary" and "ministerial" as follows:

"[D]iscretionary acts are those which are *unique to a particular public office*, while ministerial acts are those which a person performs on a given state of facts in a *prescribed manner*, *in obedience to the mandate of legal authority*, and without reference to the official's discretion ***372** as to the propriety of the act." (Emphases added.) *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988.

See also *Harinek v. 161 North Clark Street Ltd.*

Partnership, 181 Ill.2d 335, 343, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998). We concluded in *Snyder* that the township's duties were more properly characterized as ministerial because the Vehicle Code dictated the placement of warning signs: "Where * * * tailored statutory and regulatory guidelines place certain constraints on the decisions of officials, a court should be reluctant to label decisions falling wholly outside the established parameters as 'discretionary.' " *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988.

In *Harinek*, this court addressed a question of first impression with respect to section 2-201 of the Act: we considered whether section 2-201 requires that a public entity prove that its act or omission is *both* an exercise of discretion *and* a policy determination before immunity applies. We answered this question in the affirmative. The *Harinek* plaintiff was an office worker who alleged that she was injured during an office fire drill planned and conducted by the City of Chicago's fire marshal. According to the plaintiff, during the fire drill the marshal negligently directed a large group of people, including the plaintiff, to stand in the vicinity of a heavy, windowless door. As a result, the plaintiff was hit and injured when someone opened the door without warning. The plaintiff also alleged that the fire marshal had acted willfully and wantonly because he had been placed on notice that the area where he directed the group to stand was unsuitable for that purpose. *Harinek*, 181 Ill.2d at 338, 230 Ill.Dec. 11, 692 N.E.2d 1177.

The circuit court granted the City's motion to dismiss the plaintiff's complaint on the ground that the City was immune from liability under section 2-201 of the Act. The appellate court reversed, holding that section 2-201 did not insulate the City from liability because the fire marshal's conduct in "directing plaintiff to stand behind a door, though discretionary, is not a policy determination***373** within the meaning of the Act." *Harinek v. City of Chicago*, 283 Ill.App.3d 491, 496, 219 Ill.Dec. 191, 670 N.E.2d 869 (1996).

This court reversed. We held that, under the plain language of section 2-201, immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the public entity in determining policy *and* exercising discretion. *Harinek*, 181 Ill.2d at 341, 230 Ill.Dec. 11, 692 N.E.2d 1177. Accordingly, this court conducted a dual-prong inquiry with respect to whether section 2-201 immunity attached. First, we held that the allegations in the plaintiff's complaint described acts and omissions of the fire marshal in determining fire department policy. We noted that this court had previously defined " 'policy decisions made by a municipality' " as " 'those decisions which require the municipality to balance competing interests and to make a judgment call as to ****282 ***564** what solution will best serve each of those interests.' " *Harinek*, 181 Ill.2d at 342, 230 Ill.Dec. 11, 692 N.E.2d 1177, quoting *West v. Kirkham*, 147 Ill.2d 1, 11, 167 Ill.Dec. 974, 588 N.E.2d 1104 (1992). We held in *Harinek* that the allegations in the plaintiff's complaint fell squarely within this definition:

"The fire marshal is responsible for planning and conducting fire drills in the City of Chicago. In planning these drills, the marshall must balance the various interests which may compete for the time and resources of the department, including the interests of efficiency and safety. The alleged acts and omissions outlined in the complaint, such as the marshal's decisions regarding where to assemble the participants and whether to provide warning signs and alternate routing, were all part of his attempts to balance these interests. Accordingly, these acts and omissions were undertaken in determining policy within the meaning of the statute." *Harinek*, 181 Ill.2d at 342-43, 230 Ill.Dec. 11, 692 N.E.2d 1177.

We then turned to the second question of whether the acts of the fire marshal were discretionary within the meaning of section 2-201. We observed that, in *Snyder*, discretionary acts were defined as " 'those which are unique to a particular public office.' " *Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988. Applying ***374** this definition to the facts in that case, we held that the fire marshal's conduct as set forth in the plaintiff's complaint constituted an exercise of discretion:

"The marshal bears sole and final responsibility for planning and executing fire drills in buildings throughout Chicago. He is under no legal mandate to perform these duties in a prescribed manner; rather, he exercises his discretion in determining how, when, and where to hold drills such as the one in which plaintiff was injured." *Harinek*, 181 Ill.2d at 343,

230 Ill.Dec. 11, 692 N.E.2d 1177.

Accordingly, because the acts and omissions of the fire marshal alleged in the plaintiff's complaint were both a determination of policy and an exercise of discretion, section 2-201 of the Act immunized the City from liability.

This court again addressed discretionary immunity under section 2-201 in *In re Chicago Flood Litigation*, 176 Ill.2d 179, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997). *Chicago Flood* involved a dredging company hired by the City of Chicago to replace bridge piling clusters. Numerous downtown businesses were flooded when a tunnel wall under the Chicago River was breached during pile driving. A class of plaintiffs sued the dredging company and the City. The plaintiffs alleged that the City failed to supervise the pile driving; failed to maintain, repair, and protect the tunnel before and after the breach; and failed to warn the plaintiffs about the flood danger after learning of the breach. The trial court denied the City's motion to dismiss on immunity grounds and certified several questions for review, including whether the Act shielded the City from the plaintiffs' claims. The appellate court held that the City's supervision of the pile driving was discretionary under section 2-201.

We affirmed the appellate court, noting the common law distinction between discretionary and ministerial acts. *Chicago Flood*, 176 Ill.2d at 193-94, 223 Ill.Dec. 532, 680 N.E.2d 265. The plaintiffs argued that once the City approved the pile-driving plan its actions became ministerial and the City became liable ***375** for negligent supervision. *Chicago Flood*, 176 Ill.2d at 194-95, 223 Ill.Dec. 532, 680 N.E.2d 265. We ****283 ***565** disagreed, holding that the City's broad supervisory power over the dredging company's pile driving was a discretionary act because the City retained broad contractual "discretion to locate the pilings in any location it thought best." *Chicago Flood*, 176 Ill.2d at 195, 223 Ill.Dec. 532, 680 N.E.2d 265.

In *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 259 Ill.Dec. 440, 758 N.E.2d 848 (2001), the plaintiff was injured when she collided with a high school student who lost control of his vehicle as he drove home from school in inclement weather. Plaintiff sued the school district alleging that its personnel acted willfully and wantonly in refusing the student's request to leave school early because he feared getting into an accident due to the heavy snow. The school district moved to dismiss the plaintiff's complaint on the basis that it was immunized from liability under section 2-201 of the Act. We began our analysis by reiterating our holding in *Harinek* that section 2-201 requires that the alleged acts or omissions committed by a municipality must be "both a determination of policy and an exercise of discretion." *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848, citing *Harinek*, 181 Ill.2d at 341, 230 Ill.Dec. 11, 692 N.E.2d 1177. The parties in *Harrison* agreed that the decision by the school principal to refuse the student's request to leave school early was "discretionary" in nature, because his actions were " 'those which are unique to a particular public office.' " *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988. However, the parties disagreed as to whether the principal was determining policy when he denied the student's request.

In *Harrison*, we repeated our prior statement that "policy decisions [are] those that require the governmental entity or employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests." ***376***Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848. Under the facts presented, we found that the school principal had to "balance the competing interests of [the student's] desire to leave early before the weather worsened with that of the school's interest in an orderly dismissal, along with the possibility that if one student was dismissed early then, in the future, every student would want to leave early. [The principal] then had to make a judgment as to how best to perform his duties as principal and find a solution that best served all of these interests." *Harrison*, 197 Ill.2d at 474, 259 Ill.Dec. 440, 758 N.E.2d 848. Accordingly, we held that the actions of the school principal constituted policy determinations within the meaning of section 2-201. *Harrison*, 197 Ill.2d at 474, 259 Ill.Dec. 440, 758 N.E.2d 848.

Finally, in *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 261 Ill.Dec. 507, 763 N.E.2d 756 (2002), this court held that a school district's decision not to provide in-line

skating safety equipment to students was a discretionary policy determination immunized under section 2-201. In arriving at this determination, we once again reiterated that section 2-201 immunity requires that the act or omission be both a determination of policy and an exercise of discretion, and once again quoted from *Snyder* the definition that " 'discretionary acts are those which are unique to a particular public office.' " *Arteman*, 198 Ill.2d at 484-85, 261 Ill.Dec. 507, 763 N.E.2d 756, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988.

[14][15][16][17] With our section 2-201 precedent in mind, we now turn to the present ****284 ***566** case. In the matter before us, the legal sufficiency of plaintiffs' action, including plaintiffs' allegations that defendants acted in concert to achieve their objective of building Westwood Park, is admitted by defendants' section 2-619(a)(9) dismissal motions. Nevertheless, in separate motions to dismiss, defendants asserted that they were absolutely immune from liability under section 2-201 of the Tort Immunity Act, because the allegations in plaintiffs' complaint involve acts or ***377** omissions that are discretionary in nature. As stated, section 2-619(a)(9) of the Code of Civil Procedure allows involuntary dismissal of a plaintiff's claim where the claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 1994). Immunity from suit under the Tort Immunity Act is an "affirmative matter" properly raised under section 2-619(a)(9). *Bubb*, 167 Ill.2d at 378, 212 Ill.Dec. 542, 657 N.E.2d 887. It is well settled that the "affirmative matter" asserted by the defendant must be apparent on the face of the complaint; otherwise, the motion must be supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 383, 227 Ill.Dec. 560, 687 N.E.2d 1042 (1997); *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732. Once a defendant satisfies this initial burden of going forward on the section 2-619(a)(9) dismissal motion, the burden then shifts to the plaintiff to establish that the defense is " 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042, quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732. " 'If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.' " *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042, quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732. Because a dismissal under section 2-619(a)(9) resembles the grant of a motion for summary judgment, an appeal from a section 2-619(a)(9) dismissal is the same in nature as an appeal following a grant of summary judgment, and is likewise afforded *de novo* review. *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042; *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732. The reviewing court must consider whether " 'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether ***378** dismissal is proper as a matter of law.' " *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042, quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732.

[18] As an initial matter, we note that defendant Village of Downers Grove filed with this court a motion to strike section I of plaintiff's reply brief, pursuant to our Rule 341(g) (188Ill.2dR. 341(g)). Rule 341(g) provides that the reply brief "shall be confined strictly to arguments presented in the brief of the appellee." According to the Village, section I of plaintiffs' reply brief presents, for the first time, the argument that section 2-201 of the Tort Immunity Act should not apply to defendants because the alleged tortious acts at issue were not "discretionary" in that they were not "unique" to the particular public offices of the government entities involved. The Village asserts that this "unique to a particular public office" argument does not appear in any brief filed by a defendant in the instant action and, therefore, section I ****285 ***567** of plaintiffs' reply is not confined strictly to the arguments presented in the responsive briefs of appellees. This court entered an order directing that this motion be taken with the case.

We now deny the Village's motion to strike section I of plaintiffs' reply brief. In their respective response briefs, defendants argue that their actions were "discretionary" within the meaning of section 2-201. This court has repeatedly defined "discretionary" actions for purposes of section 2-201 immunity as

actions " 'unique to a particular public office.' " *Arteman*, 198 Ill.2d at 484-85, 261 Ill.Dec. 507, 763 N.E.2d 756, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988; *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848; *Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177. Furthermore, the record discloses that, in the circuit court, the plaintiffs and defendants presented specific argument as to whether the actions were "unique" to the particular public offices of the defendants. We hold that plaintiffs' discourse in their reply brief with respect to whether the ***379** alleged actions were "unique" to the defendants' particular public offices was in answer to the arguments advanced by defendants that their actions were "discretionary" within the meaning of section 2-201.

[19] We now turn to the central question of whether defendants adequately established their affirmative defense that they were entitled to absolute immunity from plaintiffs' claims under section 2-201 of the Act. As we have outlined above, our cases have made clear that there is a distinction between situations involving the making of a policy choice and the exercise of discretion. Municipal defendants are required to establish both of these elements in order to invoke immunity under section 2-201. *Arteman*, 198 Ill.2d at 484-85, 261 Ill.Dec. 507, 763 N.E.2d 756; *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848; *Harinek*, 181 Ill.2d at 341, 230 Ill.Dec. 11, 692 N.E.2d 1177; and *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988. In the case at hand, the municipal defendants have failed to establish either element.

Regarding the policy decision element, in general, formulating a plan for the construction of a park should require the consideration of site-specific conditions and the balancing of competing interests. As discussed above, this court has held that decisions requiring a governmental entity to balance competing interests and to make a judgment call as to what solution will best serve those interests are "policy decisions" within the meaning of section 2-201. *Arteman*, 198 Ill.2d at 484, 261 Ill.Dec. 507, 763 N.E.2d 756; *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848; *Harinek*, 181 Ill.2d at 342-43, 230 Ill.Dec. 11, 692 N.E.2d 1177. This "affirmative matter" asserted by defendants to defeat plaintiffs' viable claims, namely, that defendants' actions and omissions were the result of a policy decision, is not apparent on the face of the complaint. See *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042; *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732. Neither is the assertion supported by affidavit or other evidentiary materials of record. See *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042; *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732.

380** The municipal defendants have likewise failed to establish that their alleged actions or omissions were "discretionary" as contemplated by section 2-201. As stated, this court has defined "discretionary" actions to be those " 'unique to a particular public office.' " ****286568***Arteman*, 198 Ill.2d at 484-85, 261 Ill.Dec. 507, 763 N.E.2d 756, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988; *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848; *Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177. That defendants' alleged activities were unique to their particular offices is neither apparent on the face of the complaint nor supported by affidavit or other evidentiary material. See *Epstein*, 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042; *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill.2d at 116, 189 Ill.Dec. 31, 619 N.E.2d 732.

[20] Because the Tort Immunity Act is in derogation of the common law, it must be strictly construed against the public entities involved. *Zimmerman*, 183 Ill.2d at 44, 231 Ill.Dec. 914, 697 N.E.2d 699, quoting *Aikens v. Morris*, 145 Ill.2d 273, 278, 164 Ill.Dec. 571, 583 N.E.2d 487 (1991). Questions of material fact remain as to whether the conduct of the municipal defendants in the matter at bar was the result of a "policy decision" and "discretionary" within the meaning of section 2-201. We, therefore, hold that, in the matter at bar, defendants have not met their burden, as set forth in section 2-619(a)(9) of the Code of Civil Procedure, of establishing their affirmative defense under section 2-201 of the Act.

III. CONCLUSION

For the foregoing reasons, we hold that the trial and appellate courts erred by finding that section 2-201 insulates defendants' alleged conduct from liability. We hold that the municipal defendants did not meet their burden under section 2-619(a)(9) of the Code of

Civil Procedure to establish that their actions were the result of a policy decision and discretionary within the meaning of section 2-201 of the Tort Immunity Act. Accordingly, we reverse the judgments of the trial and appellate courts and remand this cause to the circuit court for further proceedings consistent with this opinion.

***381** *Reversed and remanded.*

Justice THOMAS took no part in the consideration or decision of this case.

Justice FITZGERALD, dissenting:

Though the majority holds that the trial court "improperly dismissed" the plaintiffs' claims (207 Ill.2d at 367, 278 Ill.Dec. at 560, 799 N.E.2d at 278), it does not answer the question presented by this case: namely, whether the municipal defendants are entitled to immunity under section 2-201 of the Tort Immunity Act for their park-planning decisions. Instead, without any invitation from the parties, the majority transforms this case from an immunity case into a pleading case, stretching to do procedurally what it could not do substantively-remand to give the plaintiffs another day in court. While I applaud the majority's conclusion as a noble attempt to achieve an equitable result for the plaintiffs, this conclusion is both legally indefensible and unnecessary.

By filing a motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure, the defendants acknowledged that the plaintiffs have a viable tort claim (see *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 115, 189 Ill.Dec. 31, 619 N.E.2d 732 (1993)), but they also contended that "other affirmative matter" in the form of a defense under section 2-201 of the Act defeats the claim because their park-planning decisions were discretionary. Because the defendants did not support their motion with evidentiary materials, the question thus becomes whether the existence of this defense appears on the face of the plaintiffs' complaint. See ****287***569***Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 383, 227 Ill.Dec. 560, 687 N.E.2d 1042 (1997).

The majority concludes that the defendants here failed to meet "their burden [under section 2-619(a)(9)] of establishing their affirmative defense" under the Act. 207 Ill.2d at 380, 278 Ill.Dec. at 568, 799 N.E.2d at 286. Following ***382***Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998), the majority bifurcates its section 2-201 analysis. First, the majority states that the face of the plaintiffs' complaint does not indicate the defendants' park-planning decisions were "policy decisions" requiring them to balance competing interests before choosing a course of action. Second, the majority states that the face of the plaintiffs' complaint does not indicate the defendants' park-planning decisions were "discretionary" or unique to their particular offices.

Though the majority does not refer to section 2-619(a)(6) in its discussion of the section 2-201 case law, the majority in effect raises the level of pleading specificity required before a court can find an "other affirmative matter" defense on the face of the complaint. Even a cursory examination of these cases, however, reveals that we have never sought such a close connection between the plaintiffs' allegations and the immunity claimed by the defendants.

Snyder v. Curran Township, 167 Ill.2d 466, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995), involved a jury trial, and *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 259 Ill.Dec. 440, 758 N.E.2d 848 (2001), involved a summary judgment motion, not section 2-619(a)(9) motions to dismiss. In *In re Chicago Flood Litigation*, 176 Ill.2d 179, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997), which involved motions to dismiss under both section 2-615 and section 2-619, we stated that the plaintiffs did not allege there was a prescribed method for repairing the tunnel or for notifying landowners of its breach. We then observed: "[T]he City had to make several decisions following its notice of the tunnel breach. * * * All of these decisions were within the City's discretion, which is afforded immunity against liability." *Chicago Flood*, 176 Ill.2d at 197, 223 Ill.Dec. 532, 680 N.E.2d 265. Without dissecting the complaint, we simply concluded that the City's decisions were discretionary.

***383** Then came *Harinek*, where we refined our understanding of discretionary immunity by holding that a municipal defendant's activities must be both policy-determining and discretionary. In *Harinek*, the plaintiff alleged that the City of Chicago fire department "planned, controlled, operated, and implemented" a fire drill and that the City's fire

marshall, pursuant to a plan, positioned the plaintiff near a door that struck her during the drill. *Harinek*, 181 Ill.2d at 342, 230 Ill.Dec. 11, 692 N.E.2d 1177. After reviewing the plaintiff's allegations, we held that they "describe acts and omissions of the fire marshal in determining fire department policy" (*Harinek*, 181 Ill.2d at 342, 230 Ill.Dec. 11, 692 N.E.2d 1177) and "the fire marshal's conduct described in the complaint clearly constituted an exercise of discretion" (*Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177). Again, we did not engage in a probing examination of the complaint to determine whether its allegations implicated an immunity defense under section 2-201 before concluding that the City's activities were discretionary. Finally, in *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 261 Ill.Dec. 507, 763 N.E.2d 756 (2002), our most recent pronouncement on discretionary policy immunity, we briefly referred to the allegations of the plaintiffs' ****288 ***570** complaint, but only in the background of the opinion, and concluded the school district's activities were discretionary.

Further, the majority does not even apply the pleading rule it creates. The complaint here was certainly no less descriptive than that in *Harinek*. As the majority correctly observes, the plaintiffs

"allege substantially identical conduct on the part of each municipal defendant relating to the defendants' involvement in the planning and development of Westwood Park. With respect to each defendant, plaintiffs assert that the defendants 'breached their duty to the plaintiffs by causing or allowing a change in the natural groundwater elevation and flow of groundwater to occur resulting in water from adjoining lands to gather on plaintiffs' property ***384** and the flooding of plaintiffs' real estate and residence.' " 207 Ill.2d at 369, 278 Ill.Dec. at 561, 799 N.E.2d at 279.

In fact, the plaintiffs alleged much more. According to their amended complaint, one or more of the defendants "commenced the design and planning for construction" of the park project; retained a civil engineering firm and an architectural firm for the project; "jointly produced a Schedule of Drawings and specifications" or a plan for the project depicting water drainage; "caused to be designed and constructed a storm water drainage and detention system * * * [and other] improvements to real estate"; approved the plan and accepted the public improvements to the park; and were "otherwise involved in the design, planning, supervision, observation and/or management of this construction."

Certainly, these activities involved balancing competing interests and making decisions unique to these defendants. It defies reason to conclude that the defendants planned a park and implemented that plan without deciding among alternatives and that these decisions were not unique to these defendants. Who else besides the defendants here-the Darien Park District, the City of Darien, the Village of Downers Grove, and the County of Du Page-would make such decisions regarding a park situated between Darien and Downers Grove in Du Page County? These allegations on their face clearly describe a discretionary policy decision, and the defendants were clearly entitled to immunity. Instead, the majority concludes that this case should be remanded to the trial court where the municipal defendants will, in all likelihood without delay, file legally dispositive affidavits asserting that they balanced competing interests before choosing a park plan and that this activity was unique to their offices. The plaintiffs have won this battle, but they will ultimately lose the war.

The majority's decision does unnecessary violence to our case law, in light of the plaintiffs' ability to pursue ***385** other avenues of relief. Though the plaintiffs have not asked for it, injunctive relief, against which the Act provides no protection, is available in municipal flooding cases. 745 ILCS 10/2-101 (West 1998); see *Romano v. Village of Glenview*, 277 Ill.App.3d 406, 411, 213 Ill.Dec. 799, 660 N.E.2d 56 (1995) (a municipality's decision to dig retaining ponds on a golf course near the plaintiff homeowners' property, which resulted in flooding, was an "unreasonable" interference with homeowners' property rights and not subject to immunity from injunctive relief); *Salzman v. Sumner Township*, 162 Ill.App.3d 92, 95, 113 Ill.Dec. 521, 515 N.E.2d 330 (1987) (an award of money damages against a municipality for diverting the natural flow of surface waters "would be inadequate"); see also *Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11, 191 N.E. 239 (1934); ****289 ***571** *Springer v. City of Chicago*, 308 Ill. 356, 139 N.E. 414 (1923); *Elser v. Village of Gross*

Point, 223 Ill. 230, 79 N.E. 27 (1906); *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N.E. 689 (1890); *Smith v. City of Woodstock*, 17 Ill.App.3d 948, 309 N.E.2d 45 (1974); *Larson v. Village of Capron*, 3 Ill.App.3d 764, 278 N.E.2d 830 (1972).

Additionally, though the plaintiffs have not pleaded them, constitutional claims under 42 U.S.C. § 1983 are not barred by the Act. See *Firestone v. Fritz*, 119 Ill.App.3d 685, 689, 75 Ill.Dec. 83, 456 N.E.2d 904 (1983), citing *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir.1973); see also *Howlett v. Rose*, 496 U.S. 356, 376, 110 S.Ct. 2430, 2443, 110 L.Ed.2d 332, 353 (1990). The flooding of private property caused by a public improvement may effect an unconstitutional taking.

"A city may elevate or depress its streets, as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted, that the city should be excused from paying for the injuries it has directly wrought?

It is said that the city must grade streets and direct the ***386** flow of waters as best as it can for the interests of the public. Undoubtedly, but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? * * * To the extent to which the owner is deprived of its legitimate use and in so far as its value is impaired, to that extent he should be paid.

* * * In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger, and should find no lodgment in American jurisprudence. * * *

* * *

* * * We are unable to see why the property of an individual should be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria.* We know our Constitution was designed to prevent these wrongs. We are of opinion, that, for injuries done to the property of the [business owner], by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city * * * must respond in damages." *Nevins v. City of Peoria*, 41 Ill. 502, 510-11, 515, 1866 WL 4629 (1866).

Accord *City of Dixon v. Baker*, 65 Ill. 518, 520, 1872 WL 8475 (1872) ("If municipal corporations can raise the grade of streets at discretion, and not provide suitable gutters to carry off the surface water, and thus overflow the lands abutting upon the streets, with impunity, then the owners of lots in our towns and cities are entirely at the mercy of the authorities of the municipality"); see *Graham v. Keene*, 143 Ill. 425, 32 N.E. 180 (1892); *Stack v. City of East St. Louis*, 85 Ill. 377, 1877 WL 9564 (1877); *City of Bloomington v. Brokaw & Gregory*, 77 Ill. 194, 1875 WL 8287 (1875); *City of Aurora v. Reed*, 57 Ill. 29, 1870 WL 6575 (1870); ***387 **290***572***City of Aurora v. Gillett*, 56 Ill. 132, 1870 WL 6490 (1870); *Drainage District # 1 v. Village of Green Valley*, 69 Ill.App.3d 330, 335, 25 Ill.Dec. 766, 387 N.E.2d 422 (1979); *Dwyer v. Village of Glen Ellyn*, 314 Ill.App. 572, 41 N.E.2d 786 (1942) (abstract of op.); *City of Highland v. Auer*, 235 Ill.App. 327, 1925 WL 4330 (1925); see generally G. Ratcliff, *Private Rights under Illinois Drainage Law*, 1960 U. Ill. L.F. 198, 208 ("A city has no right to change a watercourse without being liable to an adjoining landowner for any resulting damage"); K. Roberts, Note, *Tort Liability of Municipal Corporations in Illinois*, 1951 U. Ill. L.F. 637, 645 ("The law seems to be well settled in Illinois that a municipal corporation may not construct public works and improvements in such a way as to cause surface water to flow in a different manner or in a substantially increased quantity upon the land of private owners").[FN2]

FN2. The State also would be liable for such damage. See, *e.g.*, *Branding v. State*, 31 Ill. Ct. Cl. 455, 457, 1977 WL 20634 (1977) ("one who negligently alters the natural flow

of water on the property of an adjacent landowner, thereby causing damage, is liable to such abutting landowner"); *Eckmann v. State*, 45 Ill. Ct. Cl. 282 (1993); *Vickroy v. State*, 31 Ill. Ct. Cl. 489, 1977 WL 20638 (1977); *Mount v. State*, 31 Ill. Ct. Cl. 299, 1977 WL 20618 (1977); *Shilling v. State*, 24 Ill. Ct. Cl. 395, 1963 WL 6819 (1963); *Doerr v. State*, 22 Ill. Ct. Cl. 314, 1956 WL 6820 (1956); see also *Herget National Bank of Pekin v. Kenney*, 105 Ill.2d 405, 86 Ill.Dec. 484, 475 N.E.2d 863 (1985).

In short, the majority need not warp our case law under section 2-201 of the Act just to give the plaintiffs' tort claims an illusory second life. Though section 2-201 bars the plaintiffs' tort claims, properly pleaded injunctive relief and constitutional claims could survive under the Act. I dissent.

Justice GARMAN joins in this dissent.
Justice GARMAN, also dissenting:
I join Justice Fitzgerald's dissent. I write separately to explain why I agree with Justice Fitzgerald that it is ***388** clear from the face of the complaint that the defendants were entitled to immunity.

The majority holds that it is not apparent on the face of the complaint that the defendants' actions were (1) the result of a policy decision (207 Ill.2d at 379, 278 Ill.Dec. at 568, 799 N.E.2d at 286) and (2) discretionary (207 Ill.2d at 380, 278 Ill.Dec. at 568, 799 N.E.2d at 286). The complaint alleges that the defendants planned and built a park that now causes flooding on plaintiffs' property. The allegation that the defendants planned and built a park clearly entails that the defendants's actions were the result of policy decisions and were discretionary.

The majority correctly states that "decisions requiring a governmental entity to balance competing interests and to make a judgment call as to what solutions will best serve those interests are 'policy decisions' within the meaning of section 2-201." 207 Ill.2d at 379, 278 Ill.Dec. at 567, 799 N.E.2d at 285. The majority also states that planning a park "should require the consideration of site-specific conditions and the balancing of competing interests." 207 Ill.2d at 379, 278 Ill.Dec. at 567, 799 N.E.2d at 285. When the majority concludes that it is not apparent on the face of the complaint that the park was a result of policy decisions, it assumes that, although planning a park *should* require the balancing of competing interests, it need not.

This assumption is mistaken. Planning a park (or an airport or any other substantial project) obviously involves weighing competing interests and therefore always involves policymaking. The fact that the park was planned means that someone made a conscious decision. Making a conscious****291 ***573** decision means that some interests were weighed more heavily than others.

Because planning means weighing competing interests, it is not clear what more the defendants must show to establish that they made policy decisions when they planned the park. Is it enough simply to file affidavits that assert the obvious fact that when they planned they ***389** weighed competing interests? I am concerned that our decision today may be misinterpreted by courts to mean that a defendant is not immune under section 2-201 unless he shows that he duly weighed the plaintiff's interests. It is important to bear in mind that section 2-201, by its very terms, immunizes *all* good-faith policy decisions that involve discretion, even if the discretion is abused. See *White v. Village of Homewood*, 285 Ill.App.3d 496, 502, 220 Ill.Dec. 671, 673 N.E.2d 1092 (1996).

The majority states that we have "defined 'discretionary' actions to be those ' "unique to a particular public office." ' " 207 Ill.2d at 380, 278 Ill.Dec. at 567, 799 N.E.2d at 285, quoting *Arteman*, 198 Ill.2d at 484-85, 261 Ill.Dec. 507, 763 N.E.2d 756, quoting *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988. It then holds that it is not apparent from the face of the complaint that the defendants' alleged activities were unique to their particular offices. 207 Ill.2d at 380, 278 Ill.Dec. at 567, 799 N.E.2d at 285. Although I agree that whether the defendants' activities were unique to their office is relevant, I do not agree that it provides the sole test of whether their actions were discretionary.

We first used the phrase "unique to a particular public office" to describe discretionary acts under section 2-201 in *Snyder v. Curran Township*, 167 Ill.2d 466, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995). There, however, we concluded that Curran Township's failure to place a sign warning of a curve

in conformity with the State Manual was a ministerial act not subject to immunity due, in part, to the fact that statutory and regulatory guidelines placed certain constraints on the decisions of officials. *Snyder*, 167 Ill.2d at 474, 212 Ill.Dec. 643, 657 N.E.2d 988.

In addition to *Snyder*, the majority discusses *In re Chicago Flood Litigation*, 176 Ill.2d 179, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997), *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998), *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 259 Ill.Dec. 440, 758 N.E.2d 848 (2001), and ***390***Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 261 Ill.Dec. 507, 763 N.E.2d 756 (2002). In *Chicago Flood*, the City of Chicago (the City) hired Great Lakes Dredge and Dock Company (Great Lakes) to remove and replace wood piling clusters at several city bridges. The City noted in the contract that the pilings were to be located at specified positions to prevent serious damage to underground structures. Great Lakes, however, installed the pilings at one bridge in a location other than originally designated in the contract. This caused a breach in the wall of an underground freight tunnel, which resulted in the flooding of numerous downtown businesses.

In determining whether the City was immune under section 2-201 of the Act, we noted that a municipality exercises discretion " 'when it selects and adopts a plan in the making of public improvements, such as constructing sewers or drains; but [it acts ministerially when] it begins to carry out that plan * * * and is bound to see that the work is done in a reasonably safe and skillful manner.' " *Chicago Flood*, 176 Ill.2d at 194, 223 Ill.Dec. 532, 680 N.E.2d 265, quoting *City of Chicago v. Seben*, 165 Ill. 371, 377-78, 46 N.E. 244 (1897). We ****292 ***574** concluded that the City was immune under section 2-201 because it retained discretion to determine the location of the pile drivings and because the plaintiffs failed to allege a prescribed method for repairing the tunnel and warning the plaintiffs of the tunnel breach.*Chicago Flood*, 176 Ill.2d at 196-97, 223 Ill.Dec. 532, 680 N.E.2d 265. In finding the City's actions to be discretionary and, thus, immune from liability, we did not discuss whether the acts were unique to the City.

In *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 230 Ill.Dec. 11, 692 N.E.2d 1177 (1998), we discussed whether the conduct of a City of Chicago fire marshal involved the exercise of discretion under section 2-201. The complaint alleged that a decision by the fire marshal about how to conduct a fire drill was negligent. *Harinek*, 181 Ill.2d at 338, 230 Ill.Dec. 11, 692 N.E.2d 1177. In concluding that the fire marshal exercised his discretion, we stated: "The marshal bears ***391** sole and final responsibility for planning and executing fire drills in buildings throughout Chicago. He is under no legal mandate to perform these duties in a prescribed manner; rather, he exercises his discretion in determining how, when, and where to hold drills such as the one in which plaintiff was injured." *Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177. Certainly, the point that the fire marshal bears sole responsibility for fire drills goes to the question of uniqueness. But uniqueness was not the only basis for our holding. We also observed that the marshal is not constrained by any legal mandate in deciding how to hold the drills.

In *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 259 Ill.Dec. 440, 758 N.E.2d 848 (2001), we were called upon to decide whether the school district was immune from liability for injuries allegedly caused by a high school principal's decision not to allow a student to leave school early to avoid driving home in inclement weather. Although we quoted the sentence from *Snyder* that states that discretionary acts are those which are unique to the office, we also made clear that the question whether the principal's action was discretionary was not before us because the parties agreed that it was discretionary. *Harrison*, 197 Ill.2d at 472, 259 Ill.Dec. 440, 758 N.E.2d 848.

Finally, in *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 261 Ill.Dec. 507, 763 N.E.2d 756 (2002), we held that a school district's decision not to provide roller-blade safety equipment was both a policy decision and discretionary. Again, although we quoted the language from *Snyder*, we did not apply it to conclude that the school district exercised discretion. Rather, we followed several opinions of the appellate court that held that a school district's decision not to provide safety equipment was discretionary. *Arteman*, 198 Ill.2d at 485, 261 Ill.Dec. 507, 763

N.E.2d 756. *Arteman* was primarily concerned with whether the appellate court was mistaken when it held that the common law ***392** duty of school districts to provide reasonably necessary safety equipment trumps the immunity provided by section 2-201 (*Arteman*, 198 Ill.2d at 487, 261 Ill.Dec. 507, 763 N.E.2d 756), not with whether the defendants were immune.

Thus, in none of the cases discussed by the majority have we decided whether an action was discretionary based solely on a determination of whether it was unique to the actor's office. I would hold that the proper inquiry is the one we followed in *Harinek* to hold that the fire marshal's actions were discretionary. *Harinek*, 181 Ill.2d at 343, 230 Ill.Dec. 11, 692 N.E.2d 1177. First we should ask: Where does ****293 ***575** the official whose action is challenged stand in the relevant hierarchy of decisionmakers? Did he bear the sole and final responsibility for the decision in question, or was his decision to act as he did subject to review and approval by others? The higher the official stood in the relevant chain of command, the more likely it is that he acted with discretion for the purposes of section 2-201. This prong of the inquiry captures what "uniqueness" means as actually applied in *Harinek*. Second, we should also ask to what extent the official in question was subject to a legal mandate to act in a prescribed manner. The less his freedom to act was restricted by legal mandate, the more likely it is that he acted with discretion for the purposes of section 2-201.

Applying this inquiry to the facts of this case, I would hold that it is apparent from the face of the complaint that defendants' actions were discretionary. Their decisions with respect to the park were not subject to review or approval by any higher decisionmaker, nor were they required by legal mandate to adopt any particular plan or kind of plan.

For these reasons, I respectfully dissent.

Justice FITZGERALD joins in this dissent.
Ill.,2003.
Van Meter v. Darien Park Dist.
207 Ill.2d 359, 799 N.E.2d 273, 278 Ill.Dec. 555

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TAB 14

C Wright v. Pucinski
Ill.App. 1 Dist.,2004.

Appellate Court of Illinois,First District, Fifth Division.
Judith WRIGHT and Robert Wright, Plaintiffs-Appellants,
v.
Aurelia PUCINSKI, as Director of the Department of Professional Regulation; Brian Farley, as Chief of Health-Related Prosecutions for Illinois Department of Professional Regulation; Brette Anderson, as Staff Attorney for Illinois Department of Professional Regulation; and Shari Dam, as Administrative Law Judge for Illinois Department of Professional Regulation, Defendants-Appellees.
No. 1-03-1117.

Sept. 16, 2004.

Background: Clinical professional counselor and clinical social worker who allowed their licenses to lapse after disciplinary proceedings had been initiated against them brought action against Illinois Department of Professional Regulation (IDPR), seeking declaration that IDPR lacked authority to continue prosecuting them. The Circuit Court of Cook County, Bernetta D. Bush, J., granted IDPR's motion to dismiss action, and plaintiffs appealed.

Holdings: The Appellate Court, Reid, P.J., held that:
(1) exhaustion of administrative remedies doctrine did not preclude plaintiffs from bringing legal action to challenge the jurisdiction of IDPR to continue prosecuting them, and
(2) appeal of clinical social worker was not rendered moot when IDPR dismissed the charges against him, as the charges were dismissed without prejudice.

Reversed and remanded.

West Headnotes

[1] Pretrial Procedure 307A 531

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)1 In General
307Ak531 k. Nature and Scope of Remedy in General. Most Cited Cases
Statute on involuntarily dismissals based upon certain defects or defenses allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact, while disputed questions of fact are reserved for trial proceedings, if necessary. S.H.A. 735 ILCS 5/2-619.

[2] Pretrial Procedure 307A 683

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak683 k. Presumptions and Burden of Proof. Most Cited Cases
In a proceeding on a motion to dismiss based on certain defects or defenses, the defendant bears the burden of proving any affirmative defense it relies upon. S.H.A. 735 ILCS 5/2-619.

[3] Pretrial Procedure 307A 624

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak624 k. Availability of Relief Under Any State of Facts Provable. Most Cited Cases

Pretrial Procedure 307A 686.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak686 Matters Deemed Admitted

307Ak686.1 k. In General. Most Cited Cases

Pretrial Procedure 307A 687

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak686 Matters Deemed Admitted
307Ak687 k. Well-Pleaded Facts. Most Cited Cases
On a motion to dismiss based on certain defects or defenses, the defendant admits to all well-pled facts in the complaint, as well as any reasonable inferences that may be drawn from those facts, but asks the court to conclude that there is no set of facts which would entitle the plaintiff to recover. S.H.A. 735 ILCS 5/2-619.

[4] Pretrial Procedure 307A 680

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak680 k. Fact Questions. Most Cited Cases
On a motion to dismiss based on certain defects or defenses, as long as there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law, the complaint properly may be dismissed. S.H.A. 735 ILCS 5/2-619.

[5] Pretrial Procedure 307A 681

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak681 k. Matters Considered in General. Most Cited Cases
On a motion to dismiss based on certain defects or defenses, the parties may ask the court to consider the pleadings, as well as any affidavits and deposition evidence, and to take judicial notice of facts contained in public records where such notice will aid in the efficient disposition of the case. S.H.A. 735 ILCS 5/2-619.

[6] Pretrial Procedure 307A 679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of Pleadings. Most Cited Cases
On a motion to dismiss based on certain defects or defenses, the court must construe all the pleadings and supporting matter in the light most favorable to the party opposing the motion for involuntary dismissal. S.H.A. 735 ILCS 5/2-619.

[7] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
On appeal, a dismissal on a motion to dismiss based on certain defects or defenses is addressed de novo. S.H.A. 735 ILCS 5/2-619.

[8] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
A party aggrieved by an administrative decision ordinarily cannot seek judicial review without first pursuing all available administrative remedies.

[9] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider

the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary.

[10] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
The doctrine of exhaustion of administrative remedies helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals.

[11] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
The exhaustion of administrative review doctrine includes administrative review in the circuit court.

[12] Administrative Law and Procedure 15A 657.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak657 Nature and Form of Remedy
15Ak657.1 k. In General. Most Cited Cases
Where the Administrative Review Law is applicable and provides a remedy to an agency decision, a circuit court may not redress a party's grievance through any other type of action. S.H.A. 735 ILCS 5/3-101 et seq.

[13] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Under the exhaustion doctrine, the circuit court's power to resolve factual and legal issues arising from an agency's decision must be exercised within its review of the agency's decision and not in a separate proceeding. S.H.A. 735 ILCS 5/3-101 et seq.

[14] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
When no issues of fact are presented or agency experience is not involved, or where the agency's jurisdiction is attacked because it is not authorized by statute, the doctrine of exhaustion of administrative remedies does not apply.

[15] Declaratory Judgment 118A 44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases
Exhaustion of administrative remedies doctrine did not preclude clinical professional counselor and clinical social worker who had allowed their licenses to lapse after disciplinary proceedings had been initiated against them from bringing declaratory judgment action to challenge the jurisdiction of Illinois Department of Professional Regulation (IDPR) to continue prosecuting them after they were no longer licensed, though counselor and social worker had filed motions to dismiss before the IDPR; doctrine did not preclude a challenge to the jurisdiction of an administrative agency.

[16] Appeal and Error 30 781(1)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy

30k781(1) k. In General. Most Cited Cases
A case on appeal is rendered moot where the issues that were presented in the trial court do not exist any longer because intervening events have rendered it impossible for the reviewing court to grant the complaining party effectual relief.

[17] Appeal and Error 30 781(1)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(1) k. In General. Most Cited Cases
An exception to the mootness doctrine, generally rendering a case moot on appeal when intervening events have rendered it impossible for the reviewing court to grant the complaining party effectual relief, exists when the question involved is of a substantial public nature, an authoritative determination for future guidance is needed, and the circumstances are likely to recur.

[18] Appeal and Error 30 781(1)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(1) k. In General. Most Cited Cases
An exception to the mootness doctrine, generally rendering a case moot on appeal when intervening events have rendered it impossible for the reviewing court to grant the complaining party effectual relief, exists for cases involving events of short duration that are capable of repetition, yet evading review; for such exception to apply, there must be a reasonable expectation that the same complaining party would be subject to the same action again and the action challenged must be too short in duration to be fully litigated prior to its cessation.

[19] Appeal and Error 30 781(1)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(1) k. In General. Most Cited Cases
Exceptions to the mootness doctrine, generally rendering a case moot on appeal when intervening events have rendered it impossible for the reviewing court to grant the complaining party effectual relief, are to be construed narrowly and require a clear showing of each criterion to bring the case within the terms.

[20] Declaratory Judgment 118A 392.1

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak392.1 k. In General. Most Cited Cases
Appeal by clinical social worker, challenging decision by trial court finding that the exhaustion of administrative remedies doctrine precluded him from bringing declaratory judgment action to challenge the jurisdiction of Illinois Department of Professional Regulation (IDPR) to continue prosecuting him in disciplinary proceeding after he allowed his license to lapse, was not rendered moot when the IDPR dismissed the charges against him, as the charges were dismissed without prejudice, and IDPR could bring the same charges against him at a later date.

****811 *770 ***844** The Law Offices of Nye & Associates, Ltd., Chicago (Sandra Nye, of counsel), for Appellants.
Lisa Madigan, Attorney General, Chicago (John P. Schmidt, of counsel), for Appellees.

Presiding Justice REID delivered the opinion of the court:
The plaintiffs, Judith and Robert Wright, appeal from the judgment of the circuit court that dismissed with prejudice their verified complaint for a declaratory judgment and injunctive relief. The Wrights argue that the trial court erred when it determined that they were precluded, by their own actions, from access to the circuit court by filing motions to dismiss before the administrative agency. For the reasons that follow, we reverse the decision of the trial court and remand this cause for further proceedings.

BACKGROUND

On December 20, 2000, the Illinois Department of Professional Regulation (IDPR) filed separate complaints alleging various disciplinary charges against Judith and Robert. At the time that the IDPR filed the complaints, Judith was a licensed clinical professional counselor and Robert was a licensed clinical social worker. The IDPR regulates both professions. See 225 ILCS 20/1*et seq.* (West 2000); 225 ILCS 107/1*et seq.* (West 2000).

The complaints alleged that the Wrights exploited their therapeutic relationships with patients whom they were treating to promote business ventures they jointly owned and that this constituted unethical and unprofessional behavior. These business ventures were: (1) an entity called the School of Exceptional Learning, Inc., in Chicago, Illinois, and (2) a retreat center in Elkhorn, Wisconsin. The complaints also alleged that the Wrights: (1) breached patient confidentiality, (2) failed to complete continuing education requirements, and (3) falsely reported on license renewal applications that they had completed the requisite continuing education hours.

***771** After the complaints were filed against them, the Wrights both allowed their licenses to lapse rather than renew them. Judith's license as a clinical professional counselor expired on March 31, 2001, and Robert's license as a clinical social worker expired on November 30, 2001. After their licenses lapsed, the Wrights both ****812 ***845** moved to dismiss the disciplinary complaints on the basis that the IDPR lacked statutory authority to continue the disciplinary proceedings against them since they were no longer licensed. The administrative law judge assigned to the cases denied the motions to dismiss.

On September 23, 2002, the Wrights filed a verified complaint for a declaratory judgment and injunctive relief. The Wrights requested entry of a judgment declaring that the IDPR lacked the authority to continue prosecuting them because they were no longer licensed in their respective professions.

On December 27, 2002, the defendants filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615 (West 2002). In the motion, the defendants argued that the IDPR had the authority to continue the disciplinary proceedings against the Wrights although they had allowed their licenses to lapse. The defendants claimed that the Wrights were required to exhaust their administrative remedies and wait until the disciplinary proceedings before the IDPR had concluded before seeking relief in the trial court. The Wrights filed a response in which they argued that their complaint stated a cause of action and that they were not required to exhaust administrative remedies because they were challenging the jurisdiction of the IDPR.

Although the defendants filed a section 2-615 motion to dismiss, the trial judge treated it as a section 2-619(a)(3) motion to dismiss. 735 ILCS 5/2-619(a)(3)(West 2002). On March 17, 2003, the trial court entered an order wherein it granted the defendants' motion to dismiss with prejudice "for the reasons set forth on the record." The trial judge stated that she was dismissing the complaint because the Wrights had availed themselves of the relief of the administrative agency before they had filed their motions to dismiss in the administrative proceedings. Consequently, the trial court determined that the Wrights had therefore waived any right to challenge the IDPR's jurisdiction in the circuit court until the administrative proceedings were complete. Specifically, the trial court made the following holding:

> "Administrative agencies are not different than any other plaintiff that presents itself to the court. If you want to attack the jurisdiction of something, you must do it prior to acting on the case. That has to be your motion. Whether it's a motion to quash service or proper jurisdiction. Whatever it is. You can't come to the ***772** court, appear before the agency and say give me some relief, and then say I am not going to proceed because you don't have proper jurisdiction. Jurisdictional arguments must be raised before you avail yourself of the body.
>
> I believe that since you availed yourself with the relief of the administrative agency, you are stuck with that relief until you exhaust your administrative remedies. And then you may raise that point during the administrative agency so it can be a question for review if you choose to do that. And the court can look at it on administrative review if that particular issue deserves some additional weight. I don't know what the basis of

your administrative review will be.

But clearly, in looking at the case law that addressed the issues that you talked about, it appears that the administrative agency does have a right to continue to proceed in a proceeding once it has started even though the license expired during the course of the proceedings. That appears to be consistent with the case law. But that's not what I am ruling on. I am ruling it based upon ****813 ***846** the jurisdictional question, which I think it is appropriate to bring a jurisdictional argument before the court.

But I believe once you avail yourself of the services of the administrative agency that by filing the Motion to Dismiss, and then attacking jurisdiction here that that's an inappropriate process. So, I am denying your motion for that reason pursuant to [section 2-619(a)(3)]."

Thereafter, the Wrights timely filed a notice of appeal. Subsequently, the IDPR dismissed the charges against Robert without prejudice. Consequently, there are no disciplinary charges currently pending against Robert. However, disciplinary charges are still currently pending against Judith.

ANALYSIS

[1][2][3][4][5][6][7] Section 2-619 allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact, while disputed questions of fact are reserved for trial proceedings, if necessary. *McCoy v. Illinois International Port District*, 334 Ill.App.3d 462, 466, 268 Ill.Dec. 439, 778 N.E.2d 705 (2002). In a section 2-619 proceeding, the defendant bears the burden of proving any affirmative defense it relies upon. *Streams Condominium No. 3 Ass'n v. Bosgraf*, 219 Ill.App.3d 1010, 1013, 162 Ill.Dec. 607, 580 N.E.2d 570 (1991). Under section 2-619, the defendant admits to all well-pled facts in the complaint, as well as any reasonable inferences that may be drawn from those facts (*Streams Condominium*, 219 Ill.App.3d at 1013, 162 Ill.Dec. 607, 580 N.E.2d 570), but asks the court to conclude that there is no set of facts which would entitle the plaintiff to recover ***773**(*Wolf v. Bueser*, 279 Ill.App.3d 217, 222, 215 Ill.Dec. 800, 664 N.E.2d 197 (1996)). As long as there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law, the complaint properly may be dismissed. *Wolf*, 279 Ill.App.3d at 222, 215 Ill.Dec. 800, 664 N.E.2d 197. The parties may ask the court to consider the pleadings, as well as any affidavits and deposition evidence (*Streams Condominium*, 219 Ill.App.3d at 1014, 162 Ill.Dec. 607, 580 N.E.2d 570), and to take judicial notice of facts contained in public records where such notice will aid in the efficient disposition of the case (*Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill.App.3d 720, 724, 213 Ill.Dec. 240, 658 N.E.2d 1261 (1995)). However, the court must construe all the pleadings and supporting matter in the light most favorable to the party opposing the motion for involuntary dismissal. *Wolf*, 279 Ill.App.3d at 222, 215 Ill.Dec. 800, 664 N.E.2d 197. On appeal, a dismissal pursuant to section 2-619 is addressed *de novo*. *Wolf*, 279 Ill.App.3d at 222, 215 Ill.Dec. 800, 664 N.E.2d 197.

[8][9][10] A party aggrieved by an administrative decision ordinarily cannot seek judicial review without first pursuing all available administrative remedies. *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill.2d 304, 308, 138 Ill.Dec. 270, 547 N.E.2d 437 (1989). Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary. *Castaneda*, 132 Ill.2d at 308, 138 Ill.Dec. 270, 547 N.E.2d 437. The doctrine also helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals. *Castaneda*, 132 Ill.2d at 308, 138 Ill.Dec. 270, 547 N.E.2d 437.

****814 ***847** [11][12][13] "The exhaustion doctrine includes administrative review in the circuit court. Where the Administrative Review Law [(735 ILCS 5/3-101*et seq.* (West 2002))] is applicable and provides a remedy, a circuit court may not redress a party's grievance through any other type of action. The court's power to resolve factual and legal issues arising from an agency's decision must be exercised within its review of the agency's decision and not in a separate proceeding. *Dubin v. Personnel Board*, 128 Ill.2d 490, 498-99, 132 Ill.Dec. 437, 539 N.E.2d 1243

(1989); see *Midland Hotel Corp. v. Director of Employment Security*, 282 Ill.App.3d 312, 316-17, 217 Ill.Dec. 897, 668 N.E.2d 82 (1996).

[14] This aspect of the exhaustion doctrine is well established. However, it has several exceptions that are equally well established. Two such exceptions are 'where no issues of fact are presented or agency experience is not involved * * * or where the agency's jurisdiction is attacked because it is not authorized by statute.' *Castaneda*, 132 Ill.2d at 309, 138 Ill.Dec. 270, 547 N.E.2d 437. This court has held that where an administrative assertion of authority to hear or determine certain matters is challenged on its face as not authorized by the enabling legislation, such a facial attack does not implicate the exhaustion doctrine and exhaustion is not required. ***774** This court has explained that where an agency's statutory authority to exercise jurisdiction is at issue, no questions of fact are involved. The agency's particular expertise is not implicated in the necessary statutory interpretation. *Board of Governors of State Colleges & Universities for Chicago State University v. Illinois Fair Employment Practices Comm'n*, 78 Ill.2d 143, 147-48, 35 Ill.Dec. 524, 399 N.E.2d 590 (1979), quoting *Landfill, Inc. v. Pollution Control Board*, 74 Ill.2d 541, 550-51, 25 Ill.Dec. 602, 387 N.E.2d 258 (1978); accord *Reiter v. Neilis*, 125 Ill.App.3d 774, 777-78, 81 Ill.Dec. 110, 466 N.E.2d 696 (1984)('plaintiffs did not have to comply with the Administrative Review Act in order to challenge the subject matter jurisdiction of the zoning board of appeals')." *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 551-52, 243 Ill.Dec. 224, 723 N.E.2d 256 (1999).

The Wrights argue that the trial court erred when it granted the defendants' motion to dismiss. The Wrights complain the trial court improperly held that because they previously had filed motions to dismiss before the administrative tribunal, they must now exhaust their administrative remedies. The Wrights contend that this is an instance in which the exhaustion of remedies doctrine does not apply.

[15] The Wrights are correct. In their motions to dismiss before the IDPR and in their complaint for injunctive relief before the trial court, the Wrights challenged the jurisdiction of the administrative agency. Specifically, the Wrights requested that the trial court enter a judgment which declared that the defendants lacked the statutory authority to continue prosecuting them because they were no longer licensed in their respective professions.

The exhaustion of remedies doctrine does not apply in this situation because the Wrights attacked the agency's jurisdiction on the basis that it was not authorized by statute to proceed against them. Consequently, the trial court must be reversed. See *Office of the Lake County State's Attorney v. Illinois Human Rights Comm'n*, 200 Ill.App.3d 151, 156, 146 Ill.Dec. 705, 558 N.E.2d 668 (1990)("The exhaustion of remedies doctrine does not preclude a challenge to the jurisdiction of the administrative agency, however. [Citation.] *This is because such a determination involves no questions of fact which would* *****815 ***848*** *implicate the agency's particular expertise.* [Citation.] *The exhaustion of administrative remedies is not required where a party attacks an agency's assertion of jurisdiction 'on its face and in its entirety on the ground that it is not authorized by statute.'* [Citation.]" (Emphasis added)).

At oral argument and in their briefs, the defendants agreed with the Wrights and conceded that the trial court erred when it determined that the Wrights had to exhaust their administrative remedies. Furthermore, the defendants argue that as to Robert, this appeal is moot because the disciplinary charges against him before the IDPR ***775** have been dismissed. The defendants maintain that because there are no disciplinary charges pending against Robert, this court cannot grant him any relief that would affect him.

However, as to Judith, the defendants acknowledge that the trial court determined that their motion to dismiss should be granted on the grounds that the Wrights had waived any right to challenge the IDPR's jurisdiction in the circuit court until the administrative proceedings were complete. The defendants contend that they did not assert this ground in their motion to dismiss and they do not urge it as a basis for affirmance on appeal. The defendants concede that the Wrights were not required to exhaust their remedies before seeking relief in the circuit court in light of the case law indicating that exhaustion is not required when the agency's statutory jurisdiction is at issue, relying on

County of Knox ex rel. Masterson v. The Highlands L.L.C., 188 Ill.2d 546, 552, 243 Ill.Dec. 224, 723 N.E.2d 256 (1999).

Instead, the defendants argue that a judgment may be affirmed on any ground apparent from the record, even if the circuit court did not rely upon that ground. Consequently, the defendants urge this court to affirm the trial court's decision on the basis that the IDPR had the authority to continue the disciplinary proceedings after Judith allowed her license to lapse.

[16][17][18][19] "A case on appeal is rendered moot where the issues that were presented in the trial court do not exist any longer because intervening events have rendered it impossible for the reviewing court to grant the complaining party effectual relief. [Citations.] An exception to the mootness doctrine exists when the question involved is of a substantial public nature, an authoritative determination for future guidance is needed, and the circumstances are likely to recur. [Citations.] Another exception exists for cases involving events of short duration that are capable of repetition, yet evading review. [Citations.] For that exception to apply, there must be a reasonable expectation that the same complaining party would be subject to the same action again and the action challenged must be too short in duration to be fully litigated prior to its cessation. [Citation.] These exceptions are to be construed narrowly and require a clear showing of each criterion to bring the case within the terms. [Citation.]" *In re India B.*, 202 Ill.2d 522, 542-43, 270 Ill.Dec. 30, 782 N.E.2d 224 (2002).

[20] As to Robert, this appeal is not moot. The IDPR dismissed the charges against Robert *without prejudice*. Consequently, the IDPR may bring the same charges against Robert at a later date and this same issue may be revisited.

Furthermore, the only issue that is to be considered on appeal is whether the Wrights, by filing their motions to dismiss before the ***776** administrative agency were precluded from access to the trial court. This is the only issue that is before this court. Now, that we have answered that question, it is the job of the trial court to determine ****816 ***849** whether the IDPR has subject matter jurisdiction to hear this matter.

CONCLUSION

For the foregoing reasons, the decision of the trial court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

CAMPBELL and SHEILA M. O'BRIEN, JJ., concur.
Ill.App. 1 Dist.,2004.
Wright v. Pucinski
352 Ill.App.3d 769, 816 N.E.2d 808, 287 Ill.Dec. 841

END OF DOCUMENT

TAB 15

Formerly cited as IL ST CH 111 2/3 ¶ 4-202

Effective: August 8, 2003

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 220. Utilities (Refs & Annos)
Act 5. Public Utilities Act (Refs & Annos)
Article IV. General Powers and Duties of Commission--Intergovernmental Cooperation--Construction (Refs & Annos)

5/4-202. Action for injunction

§ 4-202. Action for injunction. Whenever the Commission shall be of the opinion that any public utility is failing or omitting or about to fail or omit to do anything required of it by law or by any order, decision, rule, regulation, direction, or requirement of the Commission, issued or made under authority of this Act, or is doing anything or about to do anything or permitting anything or about to permit anything to be done contrary to or in violation of law or any order, decision, rule, regulation, direction, or requirement of the Commission, issued or made under authority of this Act, the Commission shall file an action or proceeding in the circuit court in and for the county in which the case or some part thereof arose, or in which the person or corporation complained of, if any, has its principal place of business, or in which the person complained of, if any, resides, in the name of the People of the State of Illinois, for the purpose of having the violation or threatened violation stopped and prevented, either by mandamus or injunction.

The Commission may express its opinion in a resolution based upon whatever facts and evidence have come to its attention and may issue the resolution ex parte and without holding any administrative hearing before bringing suit. Except in cases involving an imminent threat to the public health or public safety, no such resolution shall be adopted until 48 hours after the public utility has been given notice of (i) the substance of the alleged violation, including a citation to the law or order, decision, rule, regulation, or direction of the Commission alleged to have been violated and (ii) the time and date of the meeting at which such resolution will first be before the Commission for consideration.

The Commission shall file the action or proceeding by complaint in the circuit court alleging the violation or threatened violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding 20 days after the service of the copy of the complaint, within which the public utility complained of must answer the complaint, and in the meantime said public utility may be restrained. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances of the case. Such corporation or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment or order effective, may be joined as parties. The final judgment in any action or proceeding shall either dismiss the action or proceeding or grant relief by mandamus or injunction or be made permanent as prayed for in the complaint, or in such modified or other form as will afford appropriate relief. An appeal may be taken from such final judgment as in other civil cases.

CREDIT(S)

Laws 1921, p. 702, § 4-202, added by P.A. 84-617, § 1, eff. Jan. 1, 1986. Amended by P.A. 93-457, § 5, eff. Aug. 8, 2003.

Formerly Ill.Rev.Stat.1991, ch. 111 2/3, ¶ 4-202.

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1913, p. 499, § 75.
Laws 1921, p. 702, Art. V, § 75.
Laws 1965, p. 3676, § 1.
Laws 1967, p. 3981, § 1.
P.A. 79-1366, § 24.
P.A. 83-346, § 40.
Ill.Rev.Stat.1983, ch. 111 2/3, ¶ 79.

TAB 16

Effective:[See Text Amendments]

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 220. Utilities (Refs & Annos)
Act 5. Public Utilities Act (Refs & Annos)
Article V. Duties of Public Utilities Accounts and Reports (Refs & Annos)

➡ 5/5-103. Forms of accounts

§ 5-103. Such systems of accounts shall provide for forms showing all sources of incomes, the amounts due and received from each source and the amounts expended and due for each purpose, distinguishing clearly all payments for operating expenses from those for new construction, extensions and additions and for balance sheets showing assets and liabilities and various forms of proprietary interest.

CREDIT(S)

Laws 1921, p. 702, § 5-103, added by P.A. 84-617, § 1, eff. Jan. 1, 1986.

Formerly Ill.Rev.Stat.1991, ch. 111 2/3, ¶ 5-103.

Current through P.A. 95-959 of the 2008 Reg. Sess.

END OF DOCUMENT

TAB 17

Formerly cited as IL ST CH 111 2/3 ¶ 8-101

Effective: June 30, 2001

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 220. Utilities (Refs & Annos)
Act 5. Public Utilities Act (Refs & Annos)
Article VIII. Service Obligations and Conditions (Refs & Annos)

➡ 5/8-101. Duties of public utilities; nondiscrimination

§ 8-101. Duties of public utilities; nondiscrimination. A public utility shall furnish, provide, and maintain such service instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and public and as shall be in all respects adequate, efficient, just, and reasonable.

All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

A public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.

Nothing in this Section shall be construed to prevent a public utility from accepting payment electronically or by the use of a customer-preferred financially accredited credit or debit methodology.

CREDIT(S)

Laws 1921, p. 702, § 8-101, added by P.A. 84-617, § 1, eff. Jan. 1, 1986. Amended by P.A. 92-22, § 20, eff. June 30, 2001.

Formerly Ill.Rev.Stat.1991, ch. 111 2/3, ¶ 8-101.

HISTORICAL AND STATUTORY NOTES

Prior Laws:

Laws 1913, p. 476, § 32.
Laws 1921, p. 702, Art. IV, § 32.
Laws 1933, p. 841, § 1.
Laws 1945, p. 1196, § 1.
P.A. 84-796, § 4, eff. Jan. 1, 1986.
Ill.Rev.Stat.1983, ch. 111 2/3, ¶ 32.

TAB 18

Effective:[See Text Amendments]

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure (Refs & Annos)
Article II. Civil Practice (Refs & Annos)
Part 6. Pleading (Refs & Annos)

➡ 5/2-619. Involuntary dismissal based upon certain defects or defenses

§ 2-619. Involuntary dismissal based upon certain defects or defenses. (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

(b) A similar motion may be made by any other party against whom a claim is asserted.

(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

(d) The raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them

by motion does not preclude raising them by answer.

(e) Pleading over after denial by the court of a motion under this Section is not a waiver of any error in the decision denying the motion.

(f) The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.

CREDIT(S)

P.A. 82-280, § 2-619, eff. July 1, 1982. Amended by P.A. 83-707, § 1, eff. Sept. 23, 1983.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 2-619.

Current through P.A. 95-959 of the 2008 Reg. Sess.

TAB 19

➡ Rule 191. Proceedings Under Sections 2-1005, 2-619 and 2-301(b) of the Code of Civil Procedure

(a) Requirements. Motions for summary judgment under section 2-1005 of the Code of Civil Procedure [FN1] and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure [FN2] must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure, [FN3] shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion.

CREDIT(S)

Amended eff. July 1, 1971; May 28, 1982, eff. July 1, 1982; April 1, 1992, eff. Aug. 1, 1992; March 28, 2002, eff. July 1, 2002.

Formerly Ill.Rev.Stat.1991, ch. 110A, ¶ 191.

[FN1] 735 ILCS 5/2-1005.

[FN2] 735 ILCS 5/2-619.

[FN3] 735 ILCS 5/2-301.

Current with amendments received through 6/15/2008.

TAB 20

Current with amendments received through September 26, 2008.

200.190 Motions

a) Motions may be presented requesting a more sufficient pleading, a bill of particulars, the striking of irrelevant, immaterial, scurrilous or unethical matter, the addition of necessary parties, the dismissal of the proceeding for want of jurisdiction or want of prosecution, the quashing of a subpoena, the postponement of an effective date of an order, the extension of time for compliance with an order or such other relief or order as may be appropriate.

b) Motions may be presented requesting the Hearing Examiner's direction concerning prehearing submissions and procedures as provided in Section 200.310 of this Part.

c) Motions, unless made during a hearing, shall be made in writing, shall set forth the relief or order sought and shall be filed and served as provided in Section 200.150(b), (c), and (d) of this Part. Motions based on matter which does not appear of record shall be supported by affidavit.

d) Relief pending disposition of a proceeding, including interim relief, may be requested by motion.

e) Unless otherwise specified by the Hearing Examiner, responses to motions shall be filed and served within 14 days after service of the motion and replies to responses shall be filed and served within 7 days after service of the responses.

f) When the Commission grants a contested motion to dismiss a proceeding, in whole or in part, the Commission shall issue an order presenting its rationale for the grant.

(Source: Amended at 20 Ill. Reg. 10607, effective August 15, 1996)

<General Materials (GM) - References, Annotations, or Tables>

83 ILAC § 200.190, **83 IL ADC 200.190**

TAB 21

WEST'S ILLINOIS ADMINISTRATIVE CODE
TITLE 83: PUBLIC UTILITIES
CHAPTER I: ILLINOIS COMMERCE COMMISSION
SUBCHAPTER E: WATER UTILITIES
PART 650. UNIFORM SYSTEM OF ACCOUNTS FOR SEWER UTILITIES
SUBPART B. ADDITIONS TO AND DELETIONS FROM NARUC UNIFORM SYSTEM OF ACCOUNTS

Current with amendments received through September 26, 2008.

650.170 Accounting Instruction 40

a) Class A Utilities shall maintain the accounts listed in subsections (a)(1) through (a)(8) of this Section.

1) Utility Operating Accounts

Account No.	
400	Operating Revenues
401	Operating Expenses
403	Depreciation Expenses
406	Amortization of Utility Plant Acquisition Adjustments
407	Amortization Expense
407.1	Amortization of Limited Term Plant
407.2	Amortization of Property Losses
407.3	Amortization of Other Utility Plant
407.4	Amortization of Regulatory Assets
407.5	Amortization of Regulatory Liabilities
408	Taxes Other Than Income
408.10	Utility Regulatory Assessment Fees
408.11	Property Taxes
408.12	Payroll Taxes
408.13	Other Taxes and Licenses
409	Income

Taxes
409.10 Federal Income Taxes,
Utility
Operating
Income
409.11 State Income Taxes,
Utility
Operating
Income
409.12 Local Income Taxes,
Utility
Operating
Income
410 Provision for Deferred Income
Taxes
410.10 Deferred Federal Income
Taxes
Taxes
410.11 Deferred State Income
Taxes
Taxes
410.12 Deferred Local Income
Taxes
Taxes
411 Provision for Deferred Income Taxes
Credit
411.10 Provision for Deferred Income Taxes
Credit,
Utility Operating
Income
412 Investment Tax
Credits
412.10 Investment Tax Credits Deferred to
Future
Periods, Utility
Operations
412.11 Investment Tax Credits Restored to
Operating
Income, Utility
Operations
413 Income From Utility Plant Leased to
Others
414 Gains (Losses) From Disposition of
Utility
Property

2) Other Income and Deductions 415 Revenues from Merchandising, Jobbing and Contract Work

416 Costs and Expenses of Merchandising, Jobbing
and
Contract

Work

419 Interest and Dividend

Income

420 Allowance for Funds Used During

Construction

421 Nonutility

Income

426 Miscellaneous Nonutility

Expenses

3) Taxes Applicable to Other Income and Deductions 408 Taxes Other Than Income

408.20 Taxes Other Than Income, Other Income and

Deductions

409 Income

Taxes

409.20 Income Taxes, Other Income and

Deductions

410 Provision for Deferred Income

Taxes

410.20 Provision for Deferred Income Taxes Other Income

and

Deductions

411 Provision for Deferred Income Taxes

Credit

411.20 Provision for Deferred Income Taxes Credit,

Other

Income and

Deductions

412 Investment Tax

Credits

412.20 Investment Tax Credits Net, Nonutility

Operations

412.30 Investment Tax Credits Restored to

Nonoperating

Income, Utility

Operations

4) Interest Expense 427 Interest Expense

427.1 Interest on Debt to Affiliated Interests
427.2 Interest on Short-Term Debt
427.3 Interest on Long-Term Debt
427.4 Interest on Customer Deposits
427.5 Interest - Other

428 Amortization of Debt Discount and Expense
429 Amortization of Premium on Debt

5) Extraordinary Items 433 Extraordinary Income

434 Extraordinary Deductions
409.30 Income Taxes, Extraordinary Items

6) Retained Earnings Accounts 435 Balance Transferred From Income

436 Appropriations of Retained Earnings
437 Dividends Declared - Preferred Stock
438 Dividends Declared - Common Stock
439 Adjustments to Retained Earnings

7) Sewer Operation Revenue Accounts

A) Sewer Revenues 521 Flat Rate Revenues

521.1 Residential Revenues
521.2 Commercial Revenues
521.3 Industrial Revenues
521.4 Revenue from Public Authorities
521.5 Multiple Family Dwelling Revenues
521.6 Other Revenues
522 Measured Revenues
522.1 Residential Revenues
522.2 Commercial Revenues
522.3 Industrial Revenues
522.4 Revenues from Public Authorities
522.5 Multiple Family Dwelling Revenues
523 Revenues from Public Authorities
524 Revenues from Other Systems
525 Interdepartmental Revenues

B) Other Sewer Revenues 530 Guaranteed Revenues

531 Sale of Sludge
532 Forfeited Discounts

534 Rents from Sewer Property
535 Interdepartmental Rents
536 Other Sewer Revenues

C) Reclaimed Water Sales 540 Flat Rate Reuse Revenues

540.1 Residential Reuse Revenues
540.2 Commercial Reuse Revenues
540.3 Industrial Reuse Revenues
540.4 Reuse Revenues from Public Authorities
540.5 Other Revenues
541 Measured Reuse Revenues
541.1 Residential Reuse Revenues
541.2 Commercial Reuse Revenues
541.3 Industrial Reuse Revenues
541.4 Reuse Revenues from Public Utilities
544 Reuse Revenues from Other Systems

8) Sewer Operation and Maintenance Expense Accounts 701 Salaries and wages - Employees

703 Salaries and wages - Officers, Directors and Majority Stockholders
704 Employee Pensions and Benefits
710 Purchased Sewage Treatment
711 Sludge Removal Expense
715 Purchased Power
716 Fuel for Power Production
718 Chemicals
720 Materials and Supplies
731 Contractual Services - Engineering
732 Contractual Services - Accounting
733 Contractual Services - Legal
734 Contractual Services - Management Fees

735 Contractual Services - Testing
736 Contractual Services - Other
741 Rental of Building/Real Property
742 Rental of Equipment
750 Transportation Expense
756 Insurance - Vehicle
757 Insurance - General Liability
758 Insurance - Workman's Compensation
759 Insurance - Other
760 Advertising Expense
766 Regulatory Commission Expenses - Amortization of Rate Case Expense
767 Regulatory Commission Expenses- Other
770 Bad Debt - Expense
775 Miscellaneous Expenses

b) Class B utilities shall maintain the accounts listed in subsections (b)(1) through (b)(8) of this Section.

1) Utility Operating Accounts

Account No.	
400	Operating Revenues
401	Operating Expenses
403	Depreciation Expenses
406	Amortization of Utility Plant Acquisition Adjustments

407 Amortization Expense
407.1 Amortization of Limited Term Plant
407.2 Amortization of Property Losses
407.3 Amortization of Other Utility Plant
407.4 Amortization of Regulatory Assets
407.5 Amortization of Regulatory Liabilities
408 Taxes Other Than Income Taxes
409 Income Taxes
410 Provision for Deferred Income Taxes
411 Provision for Deferred Income Taxes-Credit
412 Investment Tax Credits
413 Income From Utility Plant Leased to Others
414 Gains (Losses) From Disposition of Utility Property

2) Other Income and Deductions 415 Revenues from Merchandising, Jobbing and Contract Work

416 Costs and Expenses of Merchandising, Jobbing and Contract Work
419 Interest and Dividend Income
420 Allowance for Funds Used During Construction
421 Nonutility Income
426 Miscellaneous Nonutility Expenses

3) Taxes Applicable to Other Income and Deductions 408 Taxes Other Than Income

409 Income Taxes
410 Provision for Deferred Income Taxes
411 Provision for Deferred Income Taxes-Credit
412 Investment Tax Credits

4) Interest Expense 427 Interest Expense

428 Amortization of Debt Discount and Expense
429 Amortization of Premium on Debt

5) Extraordinary Items 433 Extraordinary Income

434 Extraordinary Deduction
409.30 Income Taxes, Extraordinary Items

6) Retained Earnings Accounts 435 Balance Transferred From Income

436 Appropriations of Retained Earnings
437 Dividends Declared - Preferred Stock
438 Dividends Declared - Common Stock
439 Adjustments to Retained Earnings

7) Sewer Operation Revenue Accounts

A) Sewer Revenue 521 Flat Rate Revenue - General Customers

522 Measured Revenues - General Customers
523 Revenues from Public Authorities
524 Revenues from Other Systems
525 Interdepartmental Revenues

B) Other Sewer Revenues 530 Guaranteed Revenues

531 Sale of Sludge
532 Forfeited Discounts

534 Rents from Sewer Property
535 Interdepartmental Rents
536 Other Sewer Revenues

C) Reclaimed Water Sales 540 Flat Rate Reuse Revenues

541 Measured Reuse Revenues
544 Reuse Revenues from Other Systems

8) Sewer Operation and Maintenance Expense Accounts 701 Salaries and Wages

704 Employee Pensions and Benefits
710 Purchased Sewage Treatment
711 Sludge Removal Expense
715 Purchased Power
716 Fuel for Power Production
718 Chemicals
720 Materials and Supplies
731 Contractual Services
741 Rental of Building/Real Property
742 Rental of Equipment
750 Transportation Expense
756 Insurance
760 Advertising Expense
766 Regulatory Commission Expense
770 Bad Debt Expense
775 Miscellaneous Expenses

(Source: Amended at 22 Ill. Reg. 11722, effective July 1, 1998)

<General Materials (GM) - References, Annotations, or Tables>

83 ILAC § 650.170, **83 IL ADC 650.170**

83 IL ADC 650.170
END OF DOCUMENT